TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 215.

THOMAS J. FAUNTLEROY, PLAINTIFF IN ERROR,

vs.

J. J. LUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED JANUARY 29, 1907.

(20,551.)

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1 *Caption.*

Pleas and proceedings had and done at the regular term of the Supreme Court of Mississippi, begun and held in the Court Room, in the Capitol, in the City of Jackson, on the second Monday of October, being the 8th day of said Month, in the year of our Lord nineteen hundred and six.

Present: The Honorable Albert H. Whitfield, Chief Justice, and the Honorable S. S. Calhoon and the Honorable Robert B. Mayes, Associate Justices; Geo. C. Myers, Clerk of said Court in person; and Charles L. Johnson, Marshal.

Proclamation being made, the Court was duly opened and proceeded to the dispatch of business, and among the causes tried at said term was the following to wit:

11680.

THOS. T. FAUNTLEROY
vs.
J. J. LUM.

Appealed from the Circuit Court of Warren County.
Record filed March 13th 1905.
Affirmed December 18th 1906.

1½ *Caption of Circuit Court.*

Abstract of the Record, Proceedings, and Judgment in the case of Thomas T. Fauntleroy *vs.* J. J. Lum, tried at the October Term, 1901, before Hon. S. M. Shelton, Special Judge, in the place of Hon. George Anderson, Judge of the Ninth Judicial District (including said County) disqualified.

Organization of Court.

STATE OF MISSISSIPPI, *Warren County:*

Be it remembered that a Circuit Court for the said County, was begun and held at the Court House thereof, in the City of Vicksburg, on the Third Monday of October, A. D. 1901, being the 21st day of said month, and the day and place appointed by law for opening and holding said Court for disposing of Civil Business.

There were present: Honorable George Anderson, Judge of the Ninth Judicial District, presiding, J. M. A. Brennan, Sheriff of said County, and J. W. Collier, Clerk of said Court.

Judgment of the Court, for the Plaintiff.

Att'ys for Plaintiff, McLaurin, Armistead & Brien.

Att'ys for Defendant, Catchings & Catchings.

On the 7th day of September, plaintiff filed in the office of the Clerk of the Circuit Court his declaration, upon which summons was duly issued, the said declaration being in the words and begun as follow-:

In the Circuit Court of Warren County, State of Mississippi, to the October Term, 1900.

THOMAS T. FAUNTLEROY
vs.
JAMES J. LUM.

2 The plaintiff, Thomas T. Fauntleroy, by his attorneys, complain of James J. Lum, defendant of a plea of debt.

For that whereas Charles J. Searles, in the February term in the year 1900, of the Circuit Court of the City of St. Louis, in the State of Missouri, to-wit:—on Friday the 23rd. day of February, 1900, by the consideration and judgment of the same Court recovered against defendant in a certain action the sum of Six Hundred, Ninety-Eight & 08/100 Dollars, and also the costs of the plaintiff in that behalf, taxed at the sum of $71.50 whereof the defendant was convicted; as by the record thereof, remaining in the said Court, more fully appears; That afterwards to-wit:—on the 10th day of August 1900, the said Charles J. Searles, for value received, in writing on the margin of the record of said judgment, assigned all his right, title and interest in and to said judgment to the said plaintiff, Thomas J. Fauntleroy; a copy of the record of said judgment, and the said assignment thereof, duly, properly and legally authenticated and exemplified is herewith filed as exhibit "A" hereto; which said judgment still remains in full force: Yet the defendant has not paid to the plaintiff the said sums of money so by him recovered as aforesaid, together amounting to the sum of $769.58 or any part thereof, but refuses so to do, to the damage of the plaintiff of One Thousand Dollars, and therefore he brings this his suit for said sum, together with interest and costs, and demands judgment.

ANDERSON & McLAURIN,
*Attorneys for Pl*ft.

STATE OF MISSOURI, *City of St. Louis, ss:*

February Term, 1900.

FRIDAY, *Feb'y 23rd,* 1900.

In the Circuit Court, City of St. Louis.

8737 A.

CHARLES J. SEARLES
vs.
JAMES J. LUM.

Now at this day, this cause coming on for hearing the said parties come by their respective attorneys and thereupon comes a jury, to-wit: Frederick Beaumann, William N. Bloomfield, Theodore W. Bolgard, William F. Bollenbach, Frank Farrell, George Hardt, Henrich Henrichsehofen, Edward Kaechele, William Z. McCormack, Frederick C. Morris, Thomas J. Morrison and Thomas Sexton, twelve good and lawful men, who being duly elected,
3 tried and sworn the issue herein joined well and truly to try, and a true verdict render according to the law and the evidence, the trial of this cause progressed and being finished the jurors aforesaid upon their oaths aforesaid said:

"We, the jury, in the above entitled cause find that the defendant is indebted to plaintiff in the sum of Six Hundred & Ninety Eight 08/100 Dollars.

" (Signed) WM. Z. McCORMICK, *Foreman.*"

It is therefore considered by the Court that the plaintiff recover of the defendant the debt aforesaid as found to be due; together with his costs and charges herein expended and that execution issue therefor. Verdict and instructions filed.

For value received I hereby assign all my right, title and interest in and to the judgment of which this is the margin to Thomas T. Fauntleroy this 10th day of August 1900.

CHARLES J. SEARLES. [SEAL.]

Attest:
HENRY TROLL, *Clerk.*

STATE OF MISSOURI, *City of St. Louis, ss:*

I, Henry Troll, Clerk of the Circuit Court, City of St. Louis (the same being a Court of Record in and for said City and State), certify the annexed to be a full true and complete copy of the judgment rendered in the above entitled cause, together with the assignments thereof entered on the margin of said judgment, as fully as the same remains of record in my office.

In testimony whereof, I hereto set my hand and affix the seal of said Court, at office, in the city of St. Louis, this eleventh day of August, 1900.

[SEAL.] HENRY TROLL, *Clerk.*

STATE OF MISSOURI, *City of St. Louis, ss:*

I, John A. Talty, acting presiding Judge of the Circuit Court of the eight- Judicial Circuit of the State of Missouri (which
4 court is composed of the City aforesaid), certify that Henry Troll, whose signature appears to foregoing certificate, is, and was, at the time of signing the same, Clerk of the Circuit Court, City of St. Louis (the same being a Court of Record in and for said City and State), and that the said attestation is in due form.

Given under my hand this Eleventh day of August, 1900.

JOHN A. TALTY,
Acting Presiding Judge of the Circuit Court of the Eighth Judicial Circuit of the State of Missouri.

STATE OF MISSOURI, *City of St. Louis, ss:*

I, Henry Troll, Clerk of the Circuit Court, City of St. Louis (the same being a Court of Record in and for said City and State) certify that *John A. Talty,* is acting Presiding Judge of the Circuit Court of the Eight- Judiciai Circuit of the State of Missouri, duly commissioned and qualified.

In testimony whereof, I hereto set my hand and affix the seal of said Court, at office, in the City of St. Louis, this Eleventh day of August, 1900.

[SEAL.] HENRY TROLL, *Clerk.*

And the said Declaration is endorsed in words and figures as follows to-wit:

#2130. Thomas T. Fauntleroy *vs.* James J. Lum. Declaration. Filed Sept. 7th. 1900. J. W. Collier, Clerk. Anderson & McLaurin, Att'ys for Plaintiff.

And on the — day of —— 190– the Defendant filed his plea to the Declaration of Plaintiff, which is in words and figures as follows to-wit:

In the Circuit Court of Warren County, Miss.

THOMAS T. FAUNTLEROY
vs.
JAMES J. LUM.

5 *Plea.*

Now comes the defendant and for plea in this behalf says, that the plaintiff is not entitled to maintain his action herein, and there upon shows to the Court that in 1893 a corporation under the laws of the

State of Mississippi, known as the C. J. Searles Co. was doing business in the City of Vicksburg, Miss. and that it was engaged among other things, in the business of negotiating as broker, contracts in form for the purchase or sale of cotton at a future day, the parties to such contracts however, not intending that the cotton described therein should be actually delivered in kind, and the price thereof paid by the person named therein as purchaser, such contracts being of the kind commonly called "futures," that the said corporation was the successor in business of one C. J. Searles, who had conducted in said City the same character of business, and as a part thereof had negotiated the same class of contracts above described;

That the said C. J. Searles had negotiated for defendant contracts of said class and character and that he had agreed with his successor in business, the said C. J. Searles & Co. that he would discharge and satisfy in its favor any and all obligations or indebtedness which defendant might come under to the said C. J. Searles Co., as the result and in consequence of contracts of the character above described which might thereafter be negotiated by it at the instance of defendant; that the said C. J. Searles Co. thereafter negotiated for the defendant a contract in form for the purchase by him of 200 bales of cotton to be delivered at a future day, neither himself nor the apparent seller thereof, intending that the same should be actually delivered in kind, and the price thereof paid by defendant, at the time when according to the terms of said contract the same was to be delivered, the said contract being of the kind commonly called "futures;" that the defendant placed in the hands of the C. J. Searles Co. $200.00 the same being a margin of one dollar per bale, to protect the said C. J. Searles Co. against any loss it might incur by reason of a possible decline in value of cotton of the grade mentioned in said contract so negotiated by it, and being the customary margin exacted by brokers engaged in the negotiation of such contracts; that subsequently, there having been a decline in cotton in grade named in said contract, at the demand of said C. J. Searles Co. defendant placed in its possession an additional $200.00 as a margin
6 for its protection as aforesaid; that subsequently, there having been a further decline in the value of cotton of the grade described in said contract, and defendant having failed to place with said C. J. Searles Co. an additional sum as a margin for its protection, the said C. J. Searles Co. sold or closed out said contract in accordance with the custom in regard to such contracts and demanded of defendant a sum equal to the difference between the price fixed in the said contract as that to be paid by defendant and the price of cotton of the grade described in said contract on the day the same was so sold or closed out, to-wit: the sum of $507.21, the said C. J. Searles Co. claiming to have paid said sum on behalf of defendant to the person alleged to have sold said cotton; that defendant does not know who was the alleged vendor of said cotton, he, in accordance with the custom in such cases, having dealt only with the broker, the said C. J. Searles Co., which negotiated the contract; that the said C. J. Searles was interested as part owner in the business con-

ducted by the said C. J. Searles Co.; that said C. J. Searles claimed that in pursuance of his aforesaid agreement, he thereafter paid to the said C. J. Searles Co. the aforesaid sum of $507.21 and demanded the same of the defendant, which the defendant for reasons regarded by him as sufficient refused to pay; that thereupon on Nov. 15th 1893 the controversy so arising between defendant and said C. J. Searles was, by oral argument, submitted to arbitration, the question as to the illegality of said transaction under the laws of this State, however, not being included in the submission, and an award on the same day rendered against defendant; that said C. J. Searles instituted suit on Dec. 27th, 1893 in the Circuit Court of Warren County, Miss. against defendant for the recovery of the sum then claimed to be owing to him by reason of the transaction aforesaid, and that upon its nature being shown to said Court, the said Searles on May 12th. 1894 dismissed the said suit; that thereafter, finding defendant temporarily in the State of Missouri, the said Searles instituted suit against him upon said award in the Circuit Court of the City of St. Louis, in the State of Missouri, to recover the amount thereof, to-wit:—the sum of $507.21; that upon the trial of said case the said Court refused to allow defendant to shew the nature of said transaction, and that under the laws of Mis-
7 sissippi the same was illegal and void, and held that the award aforesaid was unimpeachable and conclusive; that the said Court caused the said case to be submitted to the jury summoned therein on the instruction given by it as follows, to-wit: "If the jury beleive from the evidence that matters in controversy between plaintiff and defendant prior to Nov. 15th 1893 were on that date submitted to arbitration, and that the arbitrators rendered the award of the date Nov. 15th, 1893, which has been read in evidence, and if you further beleive from the evidence that no part of the sum rendered in favor of the plaintiff in said award has been paid to plaintiff you should find a verdict for the plaintiff for the sum of $507.21 with interest at the rate of six per cent, per annum from Nov. 15th 1893 such interest to be computed by you;" that thereupon, in pursuance of said instruction, the jury returned a verdict in favor of said Searles against defendant for the sum of $698.08 for which the Court thereupon entered judgment against defendant in favor of said Searles; that the plaintiff herein, to-wit: the said Thomas T. Fauntleroy, was the attorney for said Searles in said proceeding and was fully advised of all the facts hereinbefore set out; that on August 10th. 1900 the said Searles executed what purports to be a full assignment of said judgment to said Fauntleroy; and that notwithtsanding said assignment the said Searles is interested as part owner thereof. Wherefore defendant avers that the essential nature and real foundation of plaintiff's cause of action has not been changed by the award hereinbefore mentioned, nor by the judgment thereafter rendered thereon by the Circuit Court of the City of St. Louis State of Missouri, upon which this action is based, but it is a contract made in violation of the civil and criminal laws of this State for the purchase or sale of a commodity to be delivered at

a future day, the parties not intending that *tye* commodity should be actually delivered in kind and the price paid, and of the kind commonly called "futures," within the meaning of the Statute of this State, and is therefore illegal and void, and that by virtue of said Statute the said contract cannot be enforced by this court. And this, defendant is ready to verify.

CATCHINGS & CATCHINGS,
Att'ys for Def't.

8 And the said Plea is endorsed in words and figures as follows to-wit:

#2130. Thomas J. Fauntleroy *vs.* J. J. Lum.

Demurrer to Plea.

And on the — day of ——, 19—, The plaintiff files his Demurrer to the Defendant's Plea which is in words and figures as follows to-wit:

In the Circuit Court of Warren County.

#2130.

THOMAS T. FAUNTLEROY
vs.
J. J. LUM.

Now comes the plaintiff by his attorneys and demurs to the plea of the defendant herein filed, and for cause shows:

1st. Because said plea does not state facts sufficient to constitute a defense.

2nd. Because the plea shows on its face that the facts and defense therein relied on were facts and a defense which might and *and* ought to have been pleaded in the Missouri Court.

3rd. Because the plea shows on its face that the nature of the original transaction was presented as a defense to the Missouri Court and the precise question defendant is attempting now to raise was adjudicated by said Court, the same being a Court of Competent jurisdiction both as to the subject matter and the person.

4th. Because the plea shows on its face that the judgment of the Missouri Court was based on an award, and not on the merits of the original claim.

5th. Because the plea is an attempt to discredit a judicial act of a Court of record and full jurisdiction of a sister State, which is contrary to article four, Section one of the Constitution of the United States.

6th. Because the plea is insufficient in law.

7th. And for other causes to be assigned on the hearing.

R. L. McLAURIN,
Attorney for Plaintiff.

9 And the said Demurrer is endorsed as follows to-wit:
#2130. Thomas T. Fauntleroy *vs.* J. J. Lum. Demurrer to Plea.

Order Granting Leave to Plaintiff to File Replication.

STATE OF MISSISSIPPI, *Warren County:*

At a term of the Circuit Court of the 9th Judicial District of said State, held in and for the County aforesaid at the Court House thereof, in the city of Vicksburg, and on the 7th day of April, in the year of our Lord, one thousand nine hundred and one, being a day of said term of Court.

There were present: Hon. E. E. Larkin, Judge in place of Hon. George Anderson, disqualified; J. M. A. Brennan, Sheriff, and J. W. Collier, Clerk.

Among other proceedings in said Court on the day and year aforesaid, was the following, to-wit:

#2130.

THOS. L. FAUNTLEROY
vs.
J. J. LUM.

This day this cause coming on to be heard on the demurrer of plaintiff to the defendant's plea, and the Court having heard and duly considered the same, is of the opinion that the demurrer should be over-ruled, and leave is given to the plaintiff to file a replication within sixty days.

Agreement of Counsel.

#2130.

THOMAS L. FAUNTLEROY
vs.
J. J. LUM.

In the above styled case, it is agreed by the defendant that when the Court overruled plaintiff's demurrer to defendant's plea, that the plaintiff reserved an exception to the ruling of the Court, and that the Court ordered the plaintiff to file a replication within
10 sixty days, without waiver of his rights under the exception to the demurrer, and this replication be now filed as if filed within the sixty days, and that in replying to the defendant's plea herein the plaintiff in no wise is to be understood as waiving his

demurrer to Defendant's plea and which the Court is asked to consider.

CATCHINGS & CATCHINGS,
Attorneys for the Defendant.
R. L. McLAURIN,
Att'y for Plaintiff.

And the said agreement is endorsed as follows to-wit:
#2130. Fauntleroy *vs.* Jas. J. Lum.

And on the — day of ——, 19—, the plaintiff filed in the office of the Clerk of the Circuit Court his replication to the plea of defendant, which is in words and figures as follows to-wit:

THE STATE OF MISSISSIPPI, *Warren County:*

In Circuit Court, April Term, 1901.

THOMAS T. FAUNTLEROY
vs.
J. J. LUM.

Replication to Defendant's Plea.

And now comes the plaintiff by his attorneys and for replication to the defendant's plea filed in this cause says: That the matters all and singular set forth in Defendant's Plea in this cause, were fully set forth and judicially determined by the said Circuit Court of the city of St. Louis, State of Missouri, which rendered the judgment herein sued on, which said Circuit Court of St. Louis then and there had full jurisdiction of the subject matter and the parties, and that all of the matters and things set forth in said defendant's said plea were in said Court of St. Louis judicially determined against the said defendant's contention there made, and said judgment sued on rendered against the said Defendant after the full consideration of all of said matters in that Court, and the Plaintiff says that said Defendant is now estopped by law from again inquiring into the merits of said cause upon which the judgment herein sued
11 on was rendered, by virtue of Article 4, Section 1, of the Constitution of the United States, providing that "full faith and credit shall be given in each State, to the public acts records, and judicial proceedings of every other State"; and the judgment herein sued on being a judgment of a sister State, cannot be inquired into on the merits a second time. As a part of this replication the plaintiff filed herewith a copy of the defenses mark- "Ex. A" made by the said Defendant in said Circuit Court of St. Louis in the State of Missouri in the original cause of action in which said judgment sued on was rendered all of which Plaintiff is ready to verify.

McLAURIN, ARMISTEAD & BRIEN,
Att'ys for Plaintiff.

In the Circuit Court of the City of St. Louis, to the February Term, 1898.

No. 8737, Room 6.

CHARLES J. SEARLES, Plaintiff,
vs.
JAMES J. LUM, Defendant.

STATE OF MISSOURI, *City of St. Louis, ss:*

Amended Answer.

Now, this day, comes the defendant by his attorneys and leave of Court first being had and obtained, filed this, his amended answer to plaintiff's petition herein, and answering the same,

(1) Denies each and every allegation of plaintiff's petition not hereinafter specifically admitted;

(2) And for another and separate defence defendant states that plaintiff's alleged cause of action, if any he has, accrued in the County of Warren, in the State of Mississippi, more than three years prior to the bringing of plaintiff's suit herein; that at said time there was, and still is in force in said State of Mississippi the following statute: "Actions upon an open account or a stated account not acknowledged in writing, signed by the debtor, or any unwritten contract express or implied, shall be commenced within three years next after the cause of action accrued, and not after." And said Statute further provides that: "The completion of the period of limitation herein prescribed to bar any action shall defeat and extinguish the right as well as the remedy." Defendant further
12 states that plaintiff's alleged cause of action arises out of an unwritten contract. Defendant further states that, at all the times herein or in plaintiff's petition mentioned, he has continuously been, and still is, a resident of said County of Warren, in said State of Mississippi; and that at the time of the service upon hi- of the writ in this cause he was a resident of said County of Warren, and was merely temporarily within the jurisdiction of this Court.

Wherefore, by reason of the lapse of time since said alleged cause of action accrued before the bringing of this suit, to-wit by reason of the lapse of more than three years, and by force of said statutes hereinbefore recited, defendant says that plaintiff's cause of action, if any he has, has been extinguished, and is unavailable as a cause of action, and defendant brings said Statutes into Court and pleads same as a bar, not only to plaintiff's remedy, but as a bar to said alleged cause of action itself.

(3) And for a third and separate defense, defendant states that plaintiff's alleged cause of action, if any he has, arises solely and entirely from an agreement made by plaintiff with one —— Searles whereby plaintiff agreed with said Searles in the event of defendant's failure therein, to pay said Searles any sums which might

thereafter be found to be due and owing by defendant to said Searles on account of certain transactions thereafter to be had by and between defendant and said Searles; defendant further states that said transactions consisted solely and entirely of mere wagers on the prices of commodities, and that it was never intended by defendant and said Searles, or either of them, that such commodities should or would be actually delivered, although such wagers were in the form of agreements to sell and purchase such commodities; but that it was agreed by and between plaintiff and defendant that settlements should be made of differences in such prices, all of which plaintiff had notice, and which transactions plaintiff was interested with said Searles as a partner; and that such transactions and the considerations thereof were in law illegal and void, under the laws of Mississippi, as set forth in Sec. 2114 and Sec. 2117, as well as the laws of Missouri.

(4) And for a further and separate defense, defendant
13 states that there was an election of remedies by plaintiff, in this: that on December 27th, 1893, and subsequent to the date plaintiff's alleged cause of action, if any he had accrued, in the Circuit Court of said Warren County (a Court of competent jurisdiction) the plaintiff filed a suit against defendant on alleged account stated, in the sum of four hundred eighty six & 15/100 ($486.15) dollars, on the 20th day of November, 1893, and subsequent to November 15th, 1893, the date of the award of arbitrators alleged in plaintiff's petition; and that by said suit plaintiff elected to rescind and for naught hold said award, and cannot therefore recover herein;

(5) And for another and a fifth defense herein, defendant states that thereafter on May the 12th, 1894, said suit was by said Court dismissed and this defendant was awarded his costs therein against plaintiff, but that said costs have not been paid by plaintiff to this defendant; a true and duly authenticated copy of all the proceedings had in said cause is hereto attached, and marked "Exhibit A." Defendant states that the considerations for said alleged account stated, and for said award are and were one and the same, and defendant further states that said proceedings in said Circuit Court of said Warren County are a bar to plaintiff's cause of action as alleged in his petition filed herein.

Wherefore, by reason of the premises, defendant, having fully answered, prays to be hence discharged with his costs in this behalf expended.

By BOOGHER & TAYLOR,
Attorneys for Defendant.

And the said Replication is endorsed in words and figures as follows to-wit:—

2130. Thos. T. Fauntleroy *vs.* James J. Lum. Replication. Filed ——. McLaurin Armistead & Brien, Atty's for Plaintiff.

14 *Order Granting Plaintiff — to File a Second Replication to the Defendant's Plea.*

THOS. T. FAUNTLEROY
vs.
JAMES J. LUM.

This day came on to be heard the application of the plaintiffs to file a second replication to the defendant's plea in this cause, and the Court having carefully considered the same, does grant to the plaintiff permission to file said second replication sworn to as the law requires.

S. M. SHELTON,
Special Judge.

And on the 30th day of November, 1901, the plaintiff filed in the office of the Clerk of the Circuit Court his 2nd replication to Defendant's Plea which is in words and figures as follows to-wit:—

STATE OF MISSISSIPPI, *Warren County:*

In the Circuit Court, to April Term, A. D. 1902.

2130.

THOS. T. FAUNTLEROY
vs.
J. J. LUM.

2nd Replication to Defendant's Plea.

Now comes the plaintiff by his attorneys and by leave of the Court being first had and obtained, and for a second replication to the defendant's plea filed in this cause, says; that the judgment herein sued on was rendered in a suit on an award in the Circuit Court of the city of St. Louis and State of Missouri, which award was rendered by arbitrators selected by the parties in interest to settle the controversy then pending between them, and that said award and the judgment of the said Circuit Court of the city of St. Louis and the merits of the cause therein tried on the said award cannot now be inquired into by this Court by virtue of Article 4 Section 1 of the Constitution of the United States which plaintiff is ready to verify.

McLAURIN, ARMISTEAD & BRIEN,
Att'ys for Plaintiff.

15 STATE OF MISSISSIPPI, *Warren County:*

Personally appeared before the Court, A. A. Armistead, one of the Attorneys for the plaintiff in the above styled cause who states on oath that to the best of his knowledge and belief he is advised and

believes that he has just ground to traverse the several matters proposed to be traversed, by this replication and that the several matters sought to be pleaded by way of this replication are respectively true in substance and in fact. A. A. ARMISTEAD.

Sworn to and subscribed before me this 30th day of November, 1901.

S. M. SHELTON,
Special Judge.

And the said 2nd Replication is endorsed in words and figures as follows to-wit:—

#2130. Thos. T. Fauntleroy *vs.* James J. Lum. 2nd. Replication. Filed November 30th, 1901. J. W. Collier, Clerk, by Frank Guscio, D. C. McLaurin, Armistead & Brien, Att'ys for Plaintiff.

And on the 30th day of November, 1901, the Defendant files in the office of the Clerk of the Circuit Court his demurrer to Plaintiff's first replication which is in words and figures as follows to-wit:

In the Circuit Court of Warren County, Mississippi.

THOS. T. FAUNTLEROY
vs.
JAMES J. LUM.

Now comes the defendant by his attorneys and demurs
16 to the first replication herein filed by the plaintiff for the following causes:

The said Replication is vague, uncertain and ambiguous and it cannot be ascertained therefrom whether the Plaintiff intends to deny the facts alleged by defendant in this plea, or whether the plaintiff intends without denying the facts alleged in said plea, to make an issue that the facts set out in said plea were merely adjudged by the Circuit Court of the city of St. Louis, State of Missouri, even if true, to constitute no defense to the suit in said Court.

The said replication neither traverses the facts set out in said plea, nor alleges any other facts, whether if true, would entitle the plaintiff to judgment, notwithstanding the facts set out in said plea might be true.

The said replication neither denies the facts set out in said plea, nor confesses and avoids the same, and merely seeks by indirection to raise again the questions of law presented by his demurrer to said plea, and which have heretofore by this Court been adjudged against him. CATCHINGS & CATCHINGS,
Att'ys for Defendant.

The said demurrer is endorsed in words and figures as follows to-wit:

T. T. Fauntleroy *vs.* J. J. Lum. Demurrer to 1st Replication. Filed November 30th. 1901. J. W. Collier, Clerk, By Frank Guscio, D. C. Catchings & Catchings Att'ys for Defendant.

And on the 30th day of November 1901 the defendant filed in the office of the Clerk of the Circuit Court his demurrer to the 2nd replication of the Plaintiff, which is in words and figures as follows to-wit:—

In the Circuit Court of Warren County, Mississippi.

17 THOS. T. FAUNTLEROY
vs.
JAMES J. LUM.

Now comes the Defendant by his attorneys and demurs to the second replication filed herein by plaintiff to his plea for the following causes:

The said replication neither traverses the facts pleaded by Defendant in his said plea, nor confesses or avoids the same. The said replication alleges no facts, which if true, would entitle the plaintiff to judgment herein.

The said replication seeks by indirection to present again the questions which were raised by his demurrer to the plea herein pleaded by the Defendant, and which have heretofore been adjudged against him by this Court.

CATCHINGS & CATCHINGS,
Att'ys for Defendant.

The said Demurrer to 2nd. replication is in words and figures as follows to-wit:—

T. T. Fauntleroy *vs.* J. J. Lum. Demurrer to 2nd Replication. Filed November 30th, 1901. J. W. Collier, Clerk. By Frank Guscio D. C. Catchings & Catchings Att'ys for Defendant.

Order of Court.

#2130.

THOS. T. FAUNTLEROY,
vs.
JAMES J. LUM.

This day came on to be heard the demurrers of the defendant in the above styled cause to the first and second replication filed herein to the defendant's plea in this cause, and the Court having carefully considered the same, doth order and adjudge that the
18 demurrer to plaintiff's first replication be and the same is hereby sustained, and that the demurrer to the plaintiff's second replication be and the same is hereby overruled, and the said defendant thereupon excepted to the said ruling and declined to plead further in the cause and judgment final was rendered against him in favor of the plaintiff herein.

It was therefore considered by the Court that Thos. T. Fauntleroy plaintiff in this cause do have and recover of and from Jas. J. Lum

the defendant herein, the amount of the judgment sued on to-wit:— $769.58 together with interest at 6% from the 23rd day of February 1900 to 30th day of November 1901 amounting to the sum of $81.50 making a total of $851.08 for which last named sum judgment is rendered, together with all costs in this behalf expended, for which execution may issue.

Ordered and adjudged this the 30th day of November 1901.

S. M. SHELTON,
Special Judge.

Petition for Appeal.

THOS. T. FAUNTLEROY
vs.
JAS. J. LUM.

To the Circuit Court of Warren County, Mississippi:

James J. Lum, Defendant herein, prays an appeal to the Supreme Court of Mississippi from the Judgment rendered herein against him for the sum of $851.08 on the 30th day of November 1901 to operate as a supersedeas and tenders herein a bond in the sum of $1800.00 conditioned according to law.

JAMES J. LUM, *Defendant,*
By CATCHINGS & CATCHINGS, *Att'ys.*

19 THE STATE OF MISSISSIPPI, *Warren County, ss:*

Know all men by these presents:

That We James J. Lum, Principal, and J. Dornbush and R. L. Crook, Sureties are held and firmly bound unto Thomas T. Fauntleroy in the penal sum of Eighteen Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, signed with our hands and sealed with our seals, this 26th day of February 1902.

The condition of the above Obligation is such, That whereas in a case pending in the Circuit Court of Warren County, wherein the said Thomas T. Fauntleroy was Plaintiff and James J. Lum Defendant a Judgment was rendered on the 30th day of November 1901 a day of the October Term 1901 of said Circuit Court of said County, in favor of said Plaintiff for $851.08, the defendant James J. Lum conceiving himself aggrieved thereby then and there prayed for, and obtained an appeal therefrom, returnable to the next Term of our Supreme Court, to operate as a supercedeas upon the execution of this Bond.

Now, therefore, if the said James J. Lum shall prosecute said appeal with effect, or, failing therein, shall pay and satisfy, and in all things observe, abide by, and perform the said decree of the said Circuit Court of Warren County, rendered in said cause, and also

such final Judgment as may be made in said Supreme Court, in said cause together with all costs which have accrued or may accrue, if the same be affirmed, then this Obligation to be void, otherwise to be and remain in full force and virtue.

J. J. LUM [SEAL.]
J. DORNBUSH. [SEAL.]
R. L. CROOK. [SEAL.]

Approved by me, this 26th day of February 1902.

J. W. COLLIER, *Clerk*,
By FRANK GUSCIO, *D. C.*

20 STATE OF MISSISSIPPI, *Warren County:*

I, J. W. Collier, Clerk of the Circuit Court in and for said County and State, hereby certify that the foregoing twenty one pages contain a true and correct copy of all the proceedings had and done in the case of Thomas T. Fauntleroy *vs.* J. J. Lum tried at the October Term, 1901, of the Circuit Court in and for said County and State.

Witness my hand and Seal of said Court at office in the City of Vicksburg, this 27th day of February, A. D. 1902.

J. W. COLLIER, *Clerk.*

In the Supreme Court of the State of Mississippi to March Term, A. D. 1902.

THOMAS T. FAUNTLEROY
vs.
JAS. J. LUM.

We the Attorneys of record for the plaintiff in this case hereby waive the issuance and service of citation herein and enter our appearance at this term of the Supreme Court, as if regularly served with process under the law.

McLAURIN, ARMISTEAD & BRIEN,
Att'ys for Plaintiff.

21 *Judgment of Supreme Court.*

March Term, A. D. 1902, Monday, June 9th, A. D. 1902.

10448.

JAMES J. LUM
vs.
THOMAS T. FAUNTLEROY.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Warren County, and

this Court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the October term thereof A. D. 1901, on the 30th day of November A. D. 1901, be and the same is hereby reversed and the cause remanded and that appellee do pay the costs of this appeal, to be taxed, &c.

Opinion of the Court delivered by TERRAL, Justice:

Until the Supreme Court of the United States shall expressly so declare we will not hold that a contract condemned by our civil and criminal laws as immoral, and which the courts of this state are prohibited from enforcing, is sanctified and purged of its illegality by a judgment rendered in another state against a citizen of this state sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause of action may not be inquired into, there are decisions of the supreme court which seem to hold that it is not allowable to go behind the judgment for the purpose of examining into the validity of the claim, but we are unwilling to believe that it will ever be held that a court is precluded by the constitution of the U. S. from ascertaining, whether the claim on which a judgment is rendered in another state is such an one as the courts of the states in which suit on the judgment is brought or, on the grounds of public policy, expressly prohibited from enforcing. If this be law all that is necessary to free the most corrupt transaction from all objection is to obtain service on a party and get judgment in another state, and then come into a court of this state and obtain judgment by virtue of Art. IV, 1, con. of U. S. and the act of congress in pursuance of it. It is true that the suit in Mo. was
22 on an award of Arbitrators, but the matter submitted, as averred by the plea, was a claim based on a gambling contract in "futures" illegality of the transaction was not involved in the submission, and therefore was not, if it could be, concluded by the award.

The second replication to the plea of the defendant does not controvert the allegations of the plea as to its averment that the illegality of the transaction was not involved in the arbitration, and we interpret this replication as merely intended to invoke the constitution of the United States as precluding inquiry into the nature of the cause of action on which the judgment was rendered.

This question has been raised by the demurrer to the plea, which the Court overruled and the second replication was no more than calling in question at a latter stage of the case the correctness of the former ruling. We approve the former ruling, believing that the plea represents a bar to the action.

Reversed and remanded.

23 The following is a copy of the record in the case of Thos. T. Fauntleroy *vs.* J. J. Lum on second appeal to the Supreme Court of Mississippi to wit:

Transcript of the subsequent proceedings in the case of Thos. T. Faultleroy *vs.* J. J. Lum, tried at the October term, 1902, of the Circuit Court of Warren County.

Caption.

STATE OF MISSISSIPPI, *Warren County:*

Be it remembered that a Circuit Court for the said County was begun and held at the Court house thereof, in the City of Vicksburg on the 3rd Monday of October A. D. 1902, being the 21st day of said month and the time and place appointed by law for opening and holding said Court for the disposing of civil business.

There were present: Honorable George Anderson, Judge of the ninth Judicial District presiding, J. M. A. Brennan Sheriff of said County and J. W. Collier Clerk of said Court.

Among other proceedings disposed of at said Term of Court was the following:

No. 2130.

THOS. T. FAUNTLEROY
vs.
J. J. LUM.

Judgment for the Defendant.

Attorneys for the Appellant, McLaurin Armistead & Brien.
Attorneys for the Appellee, Catchings & Catchings.
H. C. McCabe, Special Judge, by agreement.

The case having been to the Supreme Court on a former trial, this is a transcript of only the subsequent proceedings, which subsequent proceedings were also sent up to the Supreme Court and have been lost or destroyed.

Bill of Exceptions.

On the 15th day of December, A. D. 1902, there was filed in the office of the Clerk of the Circuit Court the Bill of Exceptions,
24 which said bill of exceptions is in the words and figures as follows to-wit:

STATE OF MISSISSIPPI, *Warren County:*

In the Circuit Court, October Term, A. D. 1902.

Be it remembered that on the 3rd Monday of October, 1902, as provided by law, there was begun and held in the Court House in

the city of Vicksburg, Warren County, Mississippi, a regular term of the Circuit Court of said County and State, same being the time and place provided by law for the holding of said term of court, Present, His Honor George Anderson, the regular presiding judge of the 9th Judicial District of Mississippi, of which said Warren County is a part; J. M. A. Brennan sheriff of said county, and J. W. Collier Clerk of said Court, and among other things heard and determined at said term of said court, there come on to be heard the case of Thos. T. Fauntleroy *vs.* J. J. Lum, which case was heard on the —— day of —— 1902, same being a day of said term of said court, and his Honor Judge Anderson being disqualified to preside in said cause, by reason of having been former counsel for one of the parties therein, the attorneys for the plaintiff and the defendant in said cause agreed upon the Hon. H. C. McCabe, a member of the bar of said County, to preside in the place of said George Anderson Judge, as provided by law, in the trial of this cause, and the following proceedings were had to-wit:

The mandate of the Supreme Court, together with the opinion reversing and remanding this cause by said Supreme Court on a former appeal of said cause to the Supreme Court of Mississippi, was offered and read to the Court:

(Clerk here insert said Mandate and opinion of the Supreme Court of the State of Mississippi.)

(Said Mandate and opinion of the Supreme Court has been mislaid, lost or destroyed and cannot be found in the records of the said Clerk's office, but same should be on file in the records of the Supreme Court in Jackson.)

And the court thereupon in compliance with the mandate of the Supreme Court, reversing and remanding said cause, and the opinion of said Court in said cause, accordingly sustained the demurrer of the defendant, J. J. Lum, to the plaintiff's replication filed in the pleadings herein, and the plaintiff declined to plead further judgment final was rendered for the defendant in said cause.

Judgment.

(On the 29th day of November, A. D. 1902, being a day of the October Term of the Circuit Court as aforesaid, the following proceedings were had and done on said cause and entered on the minutes of said court, which said proceedings were in the words and figures as follows, to-wit:)

2130.

THOS. T. FAUNTLEROY
vs.
J. J. LUM.

This day came the parties by their attorneys and in accordance with the mandate of the Supreme Court filed herein, it is ordered

and considered that the demurrers of the defendant to both the replications filed herein by the plaintiff to the plea of defendant be, and the same is, herby sustained, and the plaintiff refusing and declining to plead over or further in this behalf, it is considered by the Court and so ordered and adjudged that this cause be, and the same is hereby dismissed, and judgment for costs is hereby entered against the said plaintiff, Thomas T. Fauntleroy, to be taxed &c., for which execution may issue, and 60 days allowed the plaintiff to prepare Bill of Exceptions and present same to the Court for signature.

H. C. McCABE,
Special Judge Agreed upon Between the Parties in This Cause.

In order therefore that all matters and things done in said cause may be made a matter of record, and a transcript thereof certified to the Supreme Court for a hearing of said cause on this the second appeal together with the transcript previously sent up, and a transcript of this the subsequent proceedings in this cause, in this the Court below, which constitutes the record of the cause for the Supreme Court of Mississippi for a hearing of said cause on this the second appeal, as provided by law, in section 75 of the annotated Code of Mississippi of 1892 the plaintiff tenders this its bill
26 of exceptions, in said cause, and asks that the same be signed by the regular presiding Judge His Honor George Anderson, as provided by section 920 of the Annotated Code of 1892.

Witness my signature this the 12th day of December A. D. 1902.

GEO. ANDERSON,
Judge of the 9th Judicial District of Mississippi.
H. C. McCABE,
Special Judge Agreed on Between the Parties.

And the said Bill of exceptions is endorsed as follows, to-wit:

2130. Thomas T. Fauntleroy *vs.* J. J. Lum. Bill of Exceptions. Filed Dec. 15th 1902. J. W. Collier Clerk By Frank Guscio D. C.

Appeal Bond.

THE STATE OF MISSISSIPPI, *Warren County, ss:*

Know all men by these presents:

That We Thos. T. Fauntleroy Principal, and Sureties, are held and firmly bound unto J. J. Lum in the penal sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, signed with our hands and sealed with our seals, this 23rd day of November 1904.

The condition of the above Obligation is such, That whereas in a case pending in the Circuit Court of Warren County, wherein Thomas T. Fauntleroy was plaintiff and J. J. Lum Defendant a

Judgment was rendered on the 29th day of November 1902, a day of the October Term, 1902, of said Circuit Court of said County, in favor of said J. J. Lum, and Thos. T. Fauntleroy conceiving himself aggrieved thereby has prayed for, and obtained an appeal
27 therefrom, returnable to the next Term of our Supreme Court, to operate as a Supereed-as upon the execution of this Bond.

Now, therefore, if the said Thos. T. Fauntleroy shall prosecute said appeal with effect, or, failing therein, shall pay and sati-fy, and in all things observe, abide by, and perform the said Decree of the said Circuit Court of Warren County, rendered in said cause, and also such final Judgment as may be made in said Supreme Court, in said cause together with all costs which have accrued or may accrue, if the same be affirmed, then this Obligation to be void, otherwise to be and remain in full force and virtue.

THOS. T. FAUNTLEROY, [SEAL.]
By McLAURIN, ARMISTEAD & BRIEN. [SEAL.]
C. J. SEARLES. [SEAL.]
THOS. M. SEARLES. [SEAL.]

Approved by me, this 24th day of November, 1904.
J. W. COLLIER, *Clerk.*

Certificate.

STATE OF MISSISSIPPI, *Warren County:*

I, J. W. Collier, Clerk of the Circuit Court in and for said County and State, hereby certify that the foregoing is a true and correct copy of all the subsequent proceedings as the records of my office show, in the case of Thomas T. Fauntleroy *vs.* J. J. Lum.

Witness my hand and Seal of said Court at office in the City of Vicksburg, this March 10th, 1906.

J. W. COLLIER,
Circuit Clerk.

28 *Judgment of Supreme Court of Miss.*

October Term, 1906, Tuesday, December 18, 1906.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Warren County and the Court having sufficiently examined and considered the same and being of opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the October Term 1905, on the 29th day of November 1902, be and the same is hereby affirmed: and that the appellee do have and recover of the appellant and C. J. Searles, and T. M. Searles sureties on the appeal bond the cost of this cause in this Court and in the Court below to be taxed &c.

29 In the Supreme Court of Mississippi, County of Hinds.

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last, and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are true, full and correct copies of the papers each and all of them, constituting the record in the said Supreme Court of Mississippi the case of Thos. T. Fauntleroy *vs.* J. J. Lum on first and second appeal from the Circuit Court of Warren County in said State, and of the whole record on both appeals including the declaration, pleas, replications, demurrers, final judgment of the Circuit Court on first and second appeals, the final judgment and opinion of the Supreme Court of Mississippi on first appeal and the final judgment of said Supreme Court on Second appeal.

Given under my hand and seal of said Supreme Court of Mississippi, at Jackson, in the State of Mississippi, this the 2nd day of January, in the year of our Lord one thousand nine hundred and seven, and the one hundred and thirty first year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

30 In the Supreme Court of the State of Mississippi, First District, October Term, A. D. 1906.

THOMAS T. FAUNTLEROY
v.
J. J. LUM.

Petition for Writ of Error.

Now comes Thos. T. Fauntleroy, the appellant in the above entitled cause by his attorneys and respectfully represents unto the Court, that heretofore on the 18th day of December 1906, the Supreme Court of the State of Mississippi, affirmed a judgment of the Circuit Court of Warren *Co.* County, State of Mississippi, duly removed from the Circuit Court under the laws of the State of Mississippi by appeal, and the said Supreme Court being the highest Court of law having jurisdiction of said cause under the laws, and that in said cause said appellant duly and regularly set up and claimed that full faith and credit be extended by said Court to a judgment duly rendered under and by virtue of the laws of the State of Missouri in a certain cause therein, of said Court in said State of Missouri then and there had duly and regularly obtained jurisdiction and wherei- a judgment was duly and regularly rendered by *siae* Court of the State of Missouri in favor of petitioner's assignor and against the said Lum, and that thereupon appellant after due assignment instituted suit upon said judgment of said Court of the

State of Missouri in the proper Courts of the State of Mississippi, and that the said Supreme Court being then and there a Court of competent jurisdiction under the laws of said State of Mississippi, and the highest Court of law and equity having jurisdiction, your petitioner then and there in said cause duly claimed and set up the rights and guaranties given under and by virtue of the Constitution of the United States by Article iv, Section 1, of full faith and credit for said judgment so rendered in said State of Missouri, and also the rights derived under and by virtue of the said several statutes by the said Congress of the United States in that behalf duly enacted prescribing the effect of said several judgments of the said several States, and that the said Supreme Court of the State of Mississippi, then and there denied the said rights and claims of your said petitioner both the right given under the said section of said Constitution of said United States as well as under the said several Acts of Congress therein after the same had been denied by said Circuit Court of Warren County, the Court of original jurisdiction, wherefrom the said cause had been lawfully admitted by appeal to said Supreme Court; that then and there the said cause being in
31 Supreme Court of the State of Mississippi, the said rights both under the Constitution and under said statutes were duly set up by petitioner as well as set up in the said Circuit Court of Warren County, and that then and there the Supreme Court of the State of Mississippi in the said cause rendered a judgment then and there denying as alleged by petitioner the full faith and credit to said judgment of the said State of Mississippi rendered in favor of said petitioner's assignor although said petitioner then and there in said cause set up and claimed his said rights both under said Constitution of the United States and the said several Acts of Congress passed in pursuance thereof, and that said Supreme Court of the State of Mississippi, then and there denied to said petitioner his said rights in that regard, and petitioner says that grievous error hath therein happened greatly to his detriment and that petitioner is entitled under the laws to a writ of error to said Supreme Court of the State of Mississippi from the Supreme Court of the United States to correct the said errors therein committed as hereinbefore shown.

Wherefore, your petitioner prays that this Court grant an order allowing said petitioner to prosecute a writ of error to the Supreme Court of the United States, under and by virtue of the laws in that behal- made and provided, and also that an order be made fixing the amount of the bond that plaintiff in error shall be required to give upon the said writ of error and that upon giving of the same all further proceedings shall be stayed and suspended until the termination of said writ of error by the said Supreme Court of the United States.

And as in duty bound etc.

32 In the Supreme Court of the State of Mississippi, 1st District, April Term.

THOMAS T. FAUNTLEROY
v.
J. J. LUM.

Be it remembered that this day the petition of Thomas J. Fauntleroy came on for hearing and it appearing that the said Fauntleroy did claim a right in the said Court under the Constitution of the United States and that the same was claimed under Article IV section I and the acts of Congress incident thereto and that the said claim and right of the said Fauntleroy was by the said Court denied and that the said Supreme Court of the State of Mississippi is the highest State Court having jurisdiction of the said controversy and that the said controversy presented for consideration a federal question and that the same was denied by the said Supreme Court of the said State of Mississippi and that the said Fauntleroy has prayed for a writ of error to the Supreme Court of the United States and that the said Fauntleroy is entitled to have the said cause removed on the said writ to the said Supreme Court and then and there to have the writ of error issued and that the amount of the said bond ought to be in the sum of $500.00 to be approved by the Clerk of the Supreme —— of the State of Mississippi, wherefore let a writ of error issue in accordance with law and upon the said Fauntleroy entering into a bond duly conditioned according to law in the penal sum of -500.00.

Witness my signature and the seal of the said Court this *day of* 12th day of January 1907.

A. H. WHITFIELD,
Chief Justice, Supreme Court of Mississippi.

33 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to J. J. Lum, and T. C. Catchings his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol in the City of Washing-, D. C. within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Mississippi, wherein Thomas J. Fauntleroy, plaintiff is plaintiff in error and you are defendant in error, to *a*how cause, if any you can why the judgment in said writ error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this 12th. day of Jan. 1907 A. D.

S. B. MOSELEY,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi,
By JAS. GALCERAN, *L C.*

Return.

UNITED STATES OF AMERICA,
State of Mississippi, Southern District:

I hereby certify that I served the within citation on J. J. Lum, in the City of Vicksburg, Southern District of the State of Mississippi, by then and there delivering to the said Lum a true copy of the within citation,

And further certify that I served the within citation at the said City of Vicksburg, State of Mississippi, by then and there delivering to the said T. C. Catchings a true copy of the within citation.

Done at the City of Jackson, State of Mississippi this 12th. day of Jan'y 1907 A. D.

EDGAR S. WILSON,
U. S. Marshall,
By H. J. BARNES,
Deputy Marshall.

Marshall's Fees.

Service of two citations..... $4.00
Mileage .....

33½ UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the Supreme Court of the State of Mississippi, before you, or some of you, being the highest Court of law or equity of the said State in which a decision of the said suit between the said Thomas J. Fauntleroy, plaintiff and plaintiff in error, and J. J. Lum, defendant and defendant in error wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right title privil*e*dge specially set up and claimed under the said clause of the said Constitution, a manifest error hath happened to the great damage of the said Thomas J. Fauntleroy, plaintiff in error as by his complaint appears,

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seals distinctly and openly, you send the record and all the proceedings aforesaid, with all things concerning the same to the said Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 11th day of February next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, the 12th day of January, 1907 A. D.

[Seal U. S. Circuit Court, 5th Circuit, Southern District of Mississippi.]

S. B. MOSELEY,
Clerk U. S. Circuit Court Southern District of Mississippi,
By JAS. GALCERAN, *D. C.*

34 In the Supreme Court of the State of Mississippi, 1st District, Oct. Term, 1906.

THOMAS J. FAUNTLEROY
v.
J. J. LUM.

Know all men by these presents, that we Thomas J. Fauntleroy, as principal and C. J. Searles & Fred Child as sureties are held and firmly bound unto the said J. J. Lum, defendant in error in the sum of Five Hundred Dollars, to be well and truly paid, for which we bind ourselves our heirs, executors and administrators, jointly and severally firmly by these presents,

Sealed with our seals and dated this 22nd. day of December, 190- A. D. Whereas the above named plaintiff in error has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause rendered by the Supreme Court of the State of Mississippi.

Now therefore, the condition of this obligation is such that if the above named Thomas J. Fauntleroy shall prosecute the said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Witness our signatures the day and date above written.

THOMAS J. FAUNTLEROY,
By A. A. ARMSTEAD, *Att'y.*
C. J. SEARLES.
FRED CHILD.

I approve the foregoing bond this the 12th. day of January A. D. 1907.

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

35 *Citation.*

UNITED STATES OF AMERICA:

The President of the Unites States to J. J. Lum, and T. C. Catchings his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to — held at the Capitol in the City of Washington, D. C. within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Mississippi, wherein Thomas J. Fauntleroy, plaintiff is plaintiff in error and you are defendant in error, to show cause, if any you can, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this 12th day of Jan'y 1907 A. D.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

S. B. MOSELEY,
Clerk of the Circuit Court of the United States
for the Southern District of Mississippi,
By JAS. GALCERAN, *D. C.*

Return.

UNITED STATES OF AMERICA,
State of Mississippi, Southern District:

I hereby certify that I served the within citation on J. J. Lum, in the City of Vicksburg, Southern District of the State of Mississippi, by then and there delivering to the said Lum a true copy of the within citation.

And I further certify that I served the within citation at the said City of Vicksburg, State of Mississippi, by then and there delivering to the said T. C. Catchings a true copy of the within citation.

Done at the City of Jackson, State of Mississippi this 12th day of Jan'y 1907 A. D.

EDGAR S. WILSON,
U. S. Marshal,
By H. J. BARNES,
Deputy Marshal.

Marshal's Fees.

Service of two citations..... 4.00
Mileage .....

[Endorsed:] Received in Office Jan. 12, 1907. Mailed for service to Deputy Barnes Jan. 12, 1907 at Vicksburg. Filed January 17th 1907. S. B. Moseley Cl'k U. S. Circuit Court So. Dist. Mississippi. Entered No. 1133 Page 264.

36 STATE OF MISSISSIPPI, *Hinds County:*

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify that there was lodged with me as such Clerk, on January A. D. 1907, in the matter of Thos. T. Fauntleroy *vs.* J. J. Lum

1. The original appeal bond of which a copy is herein set forth.
2. One copy of the writ of error as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Jackson, Miss., this January 23rd 1907.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

UNITED STATES OF AMERICA:

Supreme Court of Mississippi.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Mississippi, — the City of Jackson, Miss., this January 23rd A. D. 1907.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

Geo. C. Myers Clerk for transcript of record $21.92. Paid by attorney for appellant.

GEO. C. MYERS, *Clerk.*

Endorsed on cover: File No. 20,551. Mississippi supreme court. Term No. 215. Thomas J. Fauntleroy, plaintiff in error, *vs.* J. J. Lum. Filed January 29th, 1907. File No. 20,551.

IN THE SUPREME COURT OF THE UNITED STATES.

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THOS. J. FAUNTLEROY,
Plaintiff in Error,

vs.

J. J. LUM.

BRIEF FOR DEFENDANT IN ERROR.

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Historical Printing Co., Vicksburg.

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STATEMENT OF THE CASE.

The following sections of the Annotated Code of Mississippi, of 1892, are the statutes of Mississippi referred to in the pleadings, as will be more particularly hereinafter explained:

> "1120. FUTURES; DEALING IN FORBIDDEN (Laws 1882, p. 140).—If any person shall deal in contracts commonly called 'futures,' or shall, by himself or his agent, directly or indirectly buy or sell any 'future' contract, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than fifty dollars nor more than five hundred dollars, and be imprisoned in the county jail not more than three months."
>
> "1121. THE SAME; BUYING OR SELLING, ETC.—If any person shall buy or sell commodities of any kind, to be delivered at a future day, without agreeing and intending that the commodities are to be actually delivered in kind, and the price paid, he shall be guilty of a misdemeanor, and, on conviction, shall be punished as prescribed in the last section."
>
> "2117. FUTURE CONTRACTS NOT EN-

> FORCED, ETC. (Laws 1882, p. 140).—A contract for the purchase or sale of a commodity of any kind, to be delivered at a future day, the parties not intending that the commodity is to be actually delivered in kind and the price paid, shall not be enforced by any court; nor shall any contract of the kind commonly called 'futures' be enforced, nor shall a contract in this section mentioned be a valid consideration, in whole or in part, for any promise or undertaking."

In 1893 the C. J. Searles Company, a corporation under the laws of the State of Mississippi, was doing business in the city of Vicksburg. It was engaged, among other things, in the business of negotiating as broker, contracts in form for the purchase or sale of cotton at a future day, the parties to such contracts, however, not intending that the cotton described therein should be actually delivered in kind and the price thereof paid by the person named therein as purchaser. Such contracts were of the kind commonly called "futures."

This corporation was the successor in business of one C. J. Searles, who had conducted in the City of Vicksburg the same character of business, and as a part thereof had negotiated the same class of contracts.

The said C. J. Searles had negotiated for the defendant in error, J. J. Lum, contracts of this class and character, and had agreed with the C. J. Searles Company, his successor in business, that he would satisfy in its favor any and all obligations or indebtedness which Mr. Lum might come under to the said C. J. Searles Company as the result and in consequence of contracts of the character described, which might thereafter be negotiated by it at Mr. Lum's instance.

Thereafter the said C. J. Searles Company negotiated for Mr. Lum a contract in form for the purchase by him of 200 bales of cotton, to be delivered at a future day, neither himself nor the apparent seller thereof intending that the same should be actually delivered in kind and the price thereof paid by Mr. Lum at the time when, according to the terms of said contract, the cotton was to be delivered, the said contract being of the kind commonly called "futures."

Mr. Lum placed in the hands of the C. J. Searles Company $200.00, the same being a margin of $1.00 per bale, to protect it against any loss it might incur by reason of the possible decline in value of cotton of the grade mentioned in

the contract so negotiated by it, and being the customary margin exacted by brokers engaged in the negotiation of such contracts. Subsequently, there having been a decline in cotton of the grade named in said contract, at the demand of C. J. Searles Co., Mr. Lum placed in its possession an additional $200.00 as a margin for its protection. Subsequently, there having been a further decline in the value of cotton of the grade described in the said contract, and Mr. Lum having failed to place with the C. J. Searles Company an additional sum as a margin for its protection, it sold or closed out the said contract in accordance with the custom in regard to such contracts, and demanded of Mr. Lum a sum equal to the difference between the price fixed in the said contract as that to be paid by Mr. Lum, and the price of cotton of the grade described in said contract on the day the same was so sold or closed out. The sum so demanded was $507.21, the C. J. Searles Company claiming to have paid that sum on behalf of Mr. Lum to the person alleged to have sold the said cotton. Mr. Lum does not know who was the alleged vendor of said cotton, he, in accordance with the custom in such cases, having dealt only with the broker, the said C. J. Searles Company, which negotiated the contract.

The said C. J. Searles was interested as part owner in the business conducted by the said C. J. Searles Company.

The said C. J. Searles claimed that in pursuance of his aforesaid agreement he thereafter paid to the said C. J. Searles Company the said sum of $507.21, and demanded the same of Mr. Lum, which, for reasons regarded by him as sufficient, he refused to pay. Thereupon, on November 15th, 1893, the controversy so arising between Mr. Lum and the said C. J. Searles was, by oral agreement, submitted to arbitration. The question as to the illegality of said transaction under the laws of Mississippi, however, was not included in the submission. On the same day an award was rendered against Mr. Lum.

C. J. Searles instituted suit on December 27th, 1893, in the Circuit Court of Warren County, Mississippi, against Mr. Lum, for the recovery of the sum then claimed to be owing to him by reason of the transaction aforesaid.

Upon the nature of the transaction being shown to the said Court, the said C. J. Searles, on May 12th, 1894, dismissed the said suit.

Thereafter, finding Mr. Lum temporarily in the State of

Missouri, the said C. J. Searles instituted suit against him upon the aforesaid award, in the Circuit Court of the City of St. Louis, to recover the amount of said award, to-wit: the sum of $507.21. Upon the trial of said case the Circuit Court of the City of St. Louis refused to allow Mr. Lum to show the nature of the said transaction, and that under the laws of Mississippi, the same was illegal and void, and held that the award aforesaid was unimpeachable and conclusive. The said court caused said case to be submitted to the jury summoned therein, on the instruction given by it as follows, to-wit:

> "If the jury believe from the evidence that the matters in controversy between plaintiff (meaning C. J. Searles) and defendant (meaning Mr. Lum) prior to November 15th, 1893, were on that date submitted to arbitration, and that the arbitrators rendered the award of the date November 15th, 1893, which has been read in evidence; and if you further believe from the evidence that no part of the sum rendered in favor of the plaintiff (meaning C. J. Searles) in said award has been paid to plaintiff (meaning C. J. Searles), you should find a verdict for the plaintiff (meaning C. J. Searles) for the sum of $507.21, with interest at the rate of 6 per cent per annum from November 15th, 1893, such interest to be computed by you."

In pursuance of said instruction the jury returned a verdict against Mr. Lum for the sum of $698.08, for which the court thereupon entered judgment against him in favor of the said C. J. Searles.

The plaintiff in error, Thos. T. Fauntleroy, was the attorney for said C. J. Searles in said proceeding, and was fully advised of all the facts hereinbefore set out.

On August 10th, 1900, the said C. J. Searles executed what purports to be a full assignment of said judgment to said Fauntleroy, but notwithstanding said assignment the said Searles is interested as part owner thereof.

On September 17th, 1901, Thos. T. Fauntleroy, as the assignee of the judgment so rendered against Mr. Lum by the Circuit Court of the City of St. Louis, brought suit in the Circuit Court of Warren County, Mississippi, against Mr. Lum, upon the said judgment. The declaration in this suit is set out on page 2 of the transcript of record. Mr. Lum filed

a plea to this declaration, which will be found on pages 4, 5, 6 and 7 of the transcript, in which all of the facts hereinbefore stated were particularly set out and pleaded precisely as they have been stated. To this plea of Mr. Lum, Mr. Fauntleroy filed a demurrer which appears on page 7 of the transcript. This demurrer was overruled, as appears from the order of the court to be found on page 8 of the transcript. Leave was given to Mr. Fauntleroy to file a replication to the said plea. A replication was filed, which appears on page 9 of the transcript. Mr. Fauntleroy filed as an Exhibit to this replication to Mr. Lum's plea, a copy of the pleas which Mr. Lum had filed to the suit of C. J. Searles against him in the Circuit Court of the City of St. Louis aforesaid. The copy of these pleas will be found on pages 10 and 11 of the transcript. Later on, by leave of the court, Mr. Fauntleroy filed a second replication to the plea of Mr. Lum, which will be found on page 12 of the transcript.

Mr. Lum filed a demurrer to the first replication, which appears on page 13, of the transcript, and a demurrer to the second replication which appears on page 14 of the transcript. On the hearing of these demurrers the court sustained Mr. Lum's demurrer to the first replication, and overruled his demurrer to the second replication. The effect of this was to eliminate from all further consideration the first replication, together with its Exhibit.

Mr. Lum declined to plead further when his demurrer to the second replication was overruled, and judgment final was rendered against him in the Circuit Court of Warren County, Mississippi, in favor of Mr. Fauntleroy. From this judgment Mr. Lum prosecuted an appeal to the Supreme Court of Mississippi, which reversed the judgment of the Circuit Court of Warren County and remanded the cause. The opinion of the Supreme Court of Mississippi, delivered upon reversing the judgment of the Circuit Court of Warren County, will be found in 80 Miss., p. 763, which being badly printed in the transcript, is set out herein as follows:

"TERRAL, J., delivered the opinion of the court.

"Until the supreme court of the United States shall expressly so declare we will not hold that a contract condemned by our civil and criminal laws as immoral, and which the courts of this state are

prohibited from enforcing, is sanctified and purged of its legality by a judgment rendered in another state against a citizen of this state, sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause of action may not be inquired into. There are decisions of the Supreme Court which seem to hold that it is not allowable to go behind the judgment for the purpose of examining into the validity of the claim, but we are unwilling to believe that it will ever be held that a court is precluded by the Constitution of the United States from ascertaining whether the claim on which a judgment is rendered in another state is such a one as the courts of the state in which suit on the judgment is brought, on grounds of public policy, are expressly prohibited from enforcing. If this be law, all that is necessary to free the most corrupt transaction from all objection is to obtain service on a party and get judgment in another state, and then come into a court of this state and obtain judgment, by virtue of art. 4, sec. 1, constitution of the United States and the act of congress in pursuance of it. It is true the suit in Missouri was on an award of arbitrators, but the matter submitted as averred by the plea was a claim based on a gambling contract in 'futures,' and the illegality of the transaction was not involved in the submission, and, therefore, was not, if it could be, concluded by the award. The second replication to the plea of defendant does not controvert the allegation of the plea as to its averment that the illegality of the transaction was not involved in the arbitration, and we interpret this replication as merely intended to invoke the constitution of the United States as precluding inquiry into the nature of the cause of action on which judgment was rendered. This question had been raised by the demurrer to the plea, which the court overruled, and the second replication was no more than calling in question at a later stage of the case the correctness of the former ruling. We approve the former ruling, believing that the plea presents a bar to the action. Reversed and remanded."

At the October Term, 1902, in pursuance of this opinion, as appears from the order set out on pages 18 and 19 of the transcript, the Circuit Court of Warren County sustained the demurrer filed by Mr. Lum to the second replication hereinbefore referred to.

On November 29th, 1902, the said Circuit Court, Mr. Fauntleroy having refused and declined to plead further, entered a judgment in favor of Mr. Lum, dismissing the suit of Mr. Fauntleroy, and taxing him with the costs incurred. From this judgment of the Circuit Court of Warren County an appeal was prosecuted by Mr. Fauntleroy to the Supreme Court of the State, which, on December 18th, 1906, entered a judgment affirming the judgment of the Circuit Court of Warren County. Its judgment on this appeal appears on page 21 of the transcript.

From this judgment of the Supreme Court of Mississippi Mr. Fauntleroy prosecuted a writ of error to this court.

From the foregoing it will be seen that all of the facts herein set forth, regarding the transaction between Mr. Lum and the C. J. Searles Company, which led to the arbitration, the award, and the suit in St. Louis, are admitted to be true. No issue was joined upon them in the Circuit Court of Warren County. A demurrer was filed to the plea which set out these facts precisely as we have stated them, which, of course, admitted them to be true as pleaded. This demurrer was overruled and Mr. Fauntleroy declined to plead further. There is no room for controversy, therefore, as to the nature of the transaction which led to these legal proceedings.

ARGUMENT.

The contract between Mr. Lum and the C. J. Searles Company, it will be seen, was directly in violation of the criminal statutes of Mississippi, and this is admitted by the pleadings. It will also be seen by Section 2117 of the Mississippi Annotated Code of 1892, above set out, that the contract between them was not *enforcible by any court in Mississippi.* The language of that section is explicit and mandatory. Such a contract "*shall not be enforced by any court.*" No court in Mississippi, therefore had jurisdiction to enforce the contract between them. The question here is whether, the contract must be enforced by the courts of this state, because a controversy arising out of it, not, however, involving the question

as to its illegality, was submitted to arbitration which resulted in an award against Mr. Lum, which was afterwards reduced to judgment through proceedings in the St. Louis court, in which Mr. Lum was denied the right to show the nature of the contract, and that it was in violation of the laws of this state and therefore void.

Does Section 1, Art. 4, of the Constitution of the United States, require the courts of Mississippi to enforce the judgment rendered by the St. Louis court under such circumstances, although the Mississippi statute expressly declares that no such contract shall be enforced by any court? It must be kept in mind that the question as to whether the contract between Mr. Lum and the C. J. Searles Company was such a contract as is condemned by the statues of Mississippi and is made by them unenforcible in any court of the state, *was not passed upon at all by the St. Louis Court*, nor was it passed upon by the arbitrators, for in submitting the controversy to arbitration the question as to the illegality of the contract was expressly reserved and was not submitted.

No matter what may have been held at one time, it is now the settled law in this court that the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and that the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it.

Wisconsin v. Pelican Ins. Co., 127 U. S. 286.

It was also settled by the case cited that the grant of judicial power was not intended to confer upon the courts of the United States jurisdiction over a suit or prosecution by one state of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all. It was also settled by the same case that the provisions of Sec. 1, Art. 4, of the Constitution establish a rule of evidence rather than of jurisdiction, and that while they make a record of a judgment rendered after due notice, in a state, conclusive evidence in the

courts of another state or of the United States, *of the matter adjudged*, they do not affect the jurisdiction either of the Court in which the judgment is rendered, or of the court in which it is offered in evidence.

In the case of **Louisiana v. Mayor of New Orleans, 109 U. S., 286,** it was claimed that a statute which reduced the taxing power of the City of New Orleans to such an extent that it was not sufficient to pay its current expenses, and also to satisfy a judgment against it, impaired the obligation of a contract and for that reason was void. This court held that it was allowable, notwithstanding Section 1, Art. 4, to inquire into the cause of action upon which the judgment was rendered, for the purpose of ascertaining whether it was based upon a contract. It appearing that the judgment had been recovered in an action of tort it was held that the statute did not impair the obligation of a contract.

By the New York Code of Civil Procedure, Sec. 1780, it is provided that "an action against a foreign corporation may be maintained by another foreign corporation or by a non-resident in one of the following cases only:

..... 3. Where the cause of action arose within the State, etc."

In the case of **Anglo-American Provision Co. v. Davis Provision Company, 62 N. E. 587,** a suit was brought in New York upon a judgment recovered by one foreign corporation against another corporation in the State of Illinois. The Court of Appeals held that the Courts of New York were not precluded by Sec. 1, Art. 4, from inquiring into the cause of action to ascertain whether it arose within the State of New York, and that the New York statute was not in violation of the United States Constitution. Judge Gray, in that court, said:

> "The effect which the appellant would have the court give to these provisions is to invest the foreign judgment with such ubiquitous character and force as upon its being brought within the statute to make it mandatory upon its courts to entertain an action for its enforcement. That this is the true construction of the clause I doubt, and my doubt appears to be supported by authority. I refer to what was said about the full faith and credit clause of the Federal

Constitution in **Wisconsin v. Pelican Insurance Co., 127 U. S., 265.**"

After quoting liberally from the opinion in the case cited by him he continued:

> "I do not think that this clause of the Federal Constitution has the virtue attributed to it by the appellant, or that the Code provision in question is in conflict with it. From a consideration of the authorities the conclusion must result that the limitation imposed by Sec. 1780 of the Code, upon the jurisdiction of the courts in the respect discussed, was a valid exercise of the power of the State, and that when the cause of action is the enforcement of a judgment rendered in a foreign jurisdiction it is not one which in the contemplation of the statute arose within the state."

The case was removed by writ of error from the Court of Appeals of New York to this Court, and is reported in 191 U. S., 373. The judgment of the Court of Appeals was affirmed. In the opinion of this Court it is said:

> "We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution established a rule of evidence rather than of jurisdiction. **Wisconsin vs. Pelican Ins. Co., 127 U.S., 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews v. Andrews, 188 U.S. 14, 36, 47, L. Ed. 366, 371, 23 Sup. Ct. Rep. 237.** The constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which congress has passed. Rev. Stat. Sec. 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court. **See Missouri v. Lewis, 101 U. S. 22, 30, sub nom. Bowman vs. Lewis, 25 L. Ed, 989, 992.** If the state does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class. **Blake**

v. McClung, 172 U. S. 289, 256, 43 L. Ed. 432, 438, 19 Sup. Ct. Rep. 165."

This court expressly held that the constitution does not require a state to give jurisdiction against its will; that it does not require a state to provide a court in which all causes of action may be tried; and that it is only where the plaintiff can find a court in which he has a right to come that the effect of the judgment is fixed by the Constitution, and the Act in pursuance of it, which Congress passed.

The court also expressly held that where a state does provide a court to which its own citizens may resort in a certain class of cases, the right which citizens of other states would have to resort to it in cases of the same class would depend not upon Sec. 1 of Art. 4, (*which is the only clause of the Constitution invoked and relied upon in this case by the plaintiff in error,*) but upon the second section, which entitles the citizens of each state to all privileges and immunities of citizens in the several states. It then declared that the Anglo-American Provision Co., being a corporation, could not invoke the second section because it was not a citizen within its meaning. The court, referring to the case of **Christmas vs. Russell, 5 Wall, 290,** points out that in that case there was no suggestion that the statute of Mississippi involved in it went to the *jurisdiction of the Court.*

Counsel for plaintiff in error, in their Brief on pages 8 and 9, say that the case of **Anglo-American Provision Co. v. Davis** is wholly outside of the present case for the reason that the Supreme Court of Mississippi held that the Circuit Court of Warren County had jurisdiction, and that it was the proper court in which to institute the action. They also say that no one ever questioned the proposition that the Circuit Court of Warren County had jurisdiction. We take direct issue with counsel in this respect. The plea filed by Mr. Lum, which is set out at large in the transcript, expressly raised the point that the Circuit Court of Warren County was without jurisdiction. The conclusion of the plea was to the effect that the contract between Mr. Lum and the C. J. Searles Company "is a contract made in violation of the civil and criminal laws of this state, for the purchase or sale of a commodity to be delivered at a future day, the parties not intending that the commodity should be actually delivered in kind and the price

paid, and of the kind commonly called "futures" within the meaning of the statute of this state, and is, therefore, illegal and void; and that by *virtue of said statute the said contract cannot be enforced by this court.*" This plea was a direct challenge of the jurisdiction of the Circuit Court of Warren County to entertain the action.

This plea was explicitly approved by the Supreme Court of Mississippi, which, in its opinion, held that the courts of the state are *prohibited from enforcing* a contract of the character described in the plea. In their opinion they refer to the contract as condemned by our criminal laws as immoral and as being one "*which the courts of this state are prohibited from enforcing.*" Again, they say in their opinion that they "are unwilling to believe that it will ever be held that a court is precluded by the constitution of the United States from ascertaining whether the claim on which a judgment is rendered in another state is such an one as the *courts of the State* in which suit on the judgment is brought on grounds of public policy *are expressly prohibited from enforcing.*" It will be seen, therefore, that the Supreme Court of Mississippi has expressly construed Sec. 2117 of the Mississippi Annotated Code of 1892, hereinbefore quoted, as denying *jurisdiction* to the courts of this state to enforce contracts of the character described in Mr. Lum's plea; and this opinion was delivered notwithstanding Sec. 156 of the Constitution of the State of Mississippi, which counsel for the plaintiff in error have set out in full on page 9 of their Brief. The construction placed by the Supreme Court of the State upon its constitution and laws is binding upon this court.

In the case of **Anglo-American Provision Co., vs. Davis Provision Company, supra,** this court, without hesitation, followed the ruling of the Court of Appeals of New York to the effect that its statute went to the *jurisdiction of its courts.*

The Act of the Legislature of Mississippi of March 7th, 1882, laws of 1882, page 140, is as follows:

> "SECTION 1. Be it enacted by the legislature of the State of Mississippi, That it shall hereafter be unlawful for any person, by agent or otherwise, to deal in contracts commonly called 'futures' in this state; and any person convicted of buying or selling, either by agent or otherwise, any future contracts,

> commonly called 'futures' shall be fined not less than fifty and not over five hundred dollars."
>
> "SECTION 2. Be it further enacted, That no money advanced for the purchase of futures, nor any agreement for the payment of any sum for such purchases, shall be enforced in any court in this state.
>
> "SECTION 3. Be it further enacted, That this act take effect and be in force from and after its passage."

As to the inhibition against the enforcement of "future" contracts, Sec. 2, of this Act is the same as Sec. 2117 of the Mississippi Code of 1892, involved in the case at bar.

After the constitution of 1890 had gone into effect, of which Sec. 156, quoted by counsel for plaintiff in error is a part, a "future" contract was made to-wit: on September 18th, 1891. It came before the Supreme Court of Mississippi in the case of **Lemonius v. Mayer, 71 Miss., 514.**

The second section of that Act, as will be seen, provided that no such contract should "*be enforced in any court in this state.*" The Supreme Court of Mississippi held that this Act went to the *jurisdiction* of the State Courts. On page 523 they say:

> "The second section proceeded in a different direction and declared that access to the courts of this state should be denied to parties to a contract for "futures," or to any one who had advanced money to be used in such contracts."

And in concluding their opinion they say:

> "These considerations lead us to the conclusion that by the second section of the Act of 1882 the complainants were *denied access to the courts* of this state to enforce their demand against Mayer & Son for the money advanced for the purchase of the 'futures' in cotton."

It is clear enough, therefore, not only from the language of Section 2117 of the Mississippi Code of 1892, but from the opinion of the Supreme Court of Mississippi, delivered in the present case, and from its opinion in the case in 71 Miss., arising under the statute of 1882 above set out, that the

contract between Mr. Lum and the C. J. Searles Company was one which the courts of the state are expressly prohibited from enforcing. In other words, these cases held that there was no court in the State of Mississippi to which the C. J. Searles Company or C. J. Searles or his assignee, the plaintiff in error, could have access for the purpose of enforcing the contract. The present case, therefore, we respectfully submit, comes directly within the ruling of this court in the case of **American-Anglo Provision Co. v. Davis Provision Co., supra.**

The case of **Andrews v. Andrews, 188 U. S. 14,** we think supports our contention. In that case it was held that the full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with the statutes of that state, to give effect to a decree rendered by a court of another state in a suit instituted by one who temporarily left the State of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state.

In the case of **Devaughn v. Hutchinson, 165 U. S. 566,** it is said:

> "It is a principle firmly established that to the laws of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

The power of a state in this respect is not conferred either by the constitution or laws of the United States, or by the constitutions and laws of the several states. It exists as a matter of sovereign right because as to such matters each state is a sovereign.

In the case of **Clarke v. Clarke, 178 U. S. 186,** a South Carolina Court having full jurisdiction over the parties in interest, who resided within that state, construed a will conveying real estate situated in Connecticut, as having the effect

of converting the real estate, wherever situated, into personalty. This construction, if correct, would have made the descent of the real estate governable by the laws of South Carolina. The Supreme Court of Connecticut declined to be bound by the decision of the South Carolina Court, and construed the will differently. It was admitted that if the will had been presented to the courts in Connecticut in the first instance, the operative force of its provisions as to real estate in that state would have been within the control of the courts of that state. It was argued, however, that the will having been construed by the South Carolina Court, which had jurisdiction over all of the parties in interest, its judgment and not the will itself became the measure of the rights of the parties as to the real estate in Connecticut. This court said:

> "The proposition when truly comprehended amounts to the contention that the laws of the respective states controlling the transmission of real property by will, or in case of intestacy are operative only so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be done directly can be accomplished by indirection and that the fundamental principle which gave to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive or even to exist at all where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut does so. In this forum the local law of Connecticut as to real estate is the law of that state as announced by the court of last resort of that state."

In support of the proposition contended for, that the judgment of the South Carolina court was binding upon the courts of Connecticut, the case of **Christmas v. Russell, 5 Wal-**

lace 290, was relied upon. Construed literally the faith and credit clause of the constitution would have justified the contention made that the Connecticut court was bound to give effect to the judgment of the South Carolina court. Yet this court did not hesitate to hold that that provision of the constitution did not in any particular impair the power of the State of Connecticut with regard to real estate within its borders.

We think that the case of **Stone v. Mississippi, 101 U. S. 814** also supports our contention. In that case it was held that a state could not, through the contract clause of the constitution, be shorn of an ever inherent authority to preserve the public morals by supervising lotteries. After citing that case this court in Andrews v. Andrews, supra, said:

> "In other words, the doctrine is that although a particular provision of the constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the states when the constitution was adopted. In view of the rule thus applied to the contract clause of the constitution, we could not maintain the claim now made as to the effect of the due faith and credit clause without saying that the states must, in the nature of things, always possess the power to legislate for the preservation of the morals of society, but that they need not have the continued authority to save society from destruction."

This court then refers at length with approval to what was said in **Wisconsin v. Pelican, 127, U. S. 266.**

In the case of **Beer v. Mass., 97 U. S. 25,** the court said:

> "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class

> of objects which demand the application of the maxim *salus populi supremè lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In **Railroad v. Husen, 95 U. S. 470,** this court said:

> "We admit that the deposit in Congress of the power to regulate foreign commerce among the states was not a surrender of that which may properly be denominated 'police power.'"

On page 466 of Tiedeman on State and Federal control of persons and property, it is truly said:

> "At all times in the history of the English and American law gambling of every variety has been the subject of police regulation. Laws controlling the right to contract have been repeatedly maintained while the statutes of all of the states in the Union are filled with prohibitions against gambling. It has never been supposed that such statutes were unconstitutional."

We respectfully submit that Sec. 1, Art 4 of the Constitution can no more be availed of to compel a state to enforce a contract made in violation of its criminal statutes, and which in the proper exercise of its police power its courts are prohibited from enforcing, than the contract clause of the constitution can be availed of to deprive a state of the authority to save society from destruction. It was expressly held in the case of **Stone v. Mississippi, supra,** that the contract clause cannot be availed of for such purpose.

It is suggested by counsel for plaintiff in error, upon page 11 of their Brief, that Mr. Lum might have removed the proceedings in the St. Louis court to this court, by writ of error upon the ground that the Missouri court had failed to give full faith and credit to the public acts of the State of Mississippi. The answer to this suggestion is perfectly obvious. The St. Louis court of appeals did not question the validity of the statutes of Mississippi which made the con-

tract between Mr. Lum and the C. J. Searles Company illegal. It simply held that because there had been an award Mr. Lum was precluded from showing the nature of the transaction and that under the laws of Mississippi it was illegal. The plea of Mr. Lum expressly states that the St. Louis court held that the award against him was *"unimpeachable and conclusive."* That court, therefore, did not question the *validity* of the Mississippi statutes, but merely construed them as being inapplicable where an award had been made, which it declared was *"unimpeachable and conclusive."* No federal question, therefore, arose, and Mr. Lum could not have removed the case to this court.

Eastern Building and Loan Association v. Williamson, 189 U. S. 125.

Respectfully submitted,

T. C. CATCHINGS.
O. W. CATCHINGS.
Attorneys for Defendant in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 215

THOMAS T. FAUNTLEROY, PLAINTIFF IN ERROR

vs.

J. J. LUM

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PLAINTIFF IN ERROR

SHEPARD BARCLAY
Of Counsel for Plaintiff in Error

(20,551)

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REPLY BRIEF FOR PLAINTIFF IN ERROR

The extremely able and ingenious brief filed by learned counsel for defendant in error tempts us to add some suggestions by way of reply, especially touching those phases of the case which involve the law of Missouri and the interpretation thereof in that State.

THE ACTION IS AT LAW, upon a judgment rendered by the circuit court in the city of St. Louis, Missouri, against Mr. Lum, defendant below (and defendant in error in this court) for $698.08 and costs, in favor of C. J. Searles (assignor of the plaintiff in error) rendered February 23, 1900.

THE DECLARATION on the Missouri judgment was filed in the Circuit Court of Warren county, Mississippi, September 7, 1900, accompanied with a copy of said judgment as an *Exhibit*, duly certified under the Act of Congress (Record, pp. 2-4).

The sufficiency of the declaration has at no time been questioned.

THE PLEA of defendant introduces the narration of a series of events (**prior** to the judgment in question), which events have been already detailed and discussed to some extent. We deem that narration in the plea wide away from any relevancy in attempting to state a defense to the judgment under the constitution and laws of the United States. Nevertheless, we venture to point to some features of that plea, as bearing upon its sufficiency or want thereof, if its recitals might be regarded by any authority as relevant to the issues raised under the federal law.

THE PLEA ASSERTS:

> *a.* "That the said C. J. Searles had **negotiated for defendant** contracts of said class and character and that he had agreed with his successor in business, the said C. J. Searles & Co., that **he would discharge** and satisfy in its favor any and all obligations or indebtedness which defendant might come under, to the said C. J. Searles Co., as the result and in consequence of contracts of the character above described which might thereafter be negotiated by it **at the instance of defendant**" (Record, p. 5).
>
> * * * * * * *
>
> *b.* The plea, later on, confesses, modestly enough, "that defendant **does not know who was the alleged vendor** of said cotton, having dealt only with the broker, the C. J. Searles Co., which negotiated the contract" (Record, p. 5).
>
> [But in an earlier part of the plea it is said that "neither himself nor the apparent seller thereof, intending that the same should be actually delivered in kind," etc.]

We claim that the averment of **no knowledge** "who was the alleged vendor" contradicts and negatives the alle-

gations of intent of the "apparent seller" whom he does not know, and with whom he admits to have had no dealing except through the broker.

* * * * * * *

c. Further on, it is said: "that said C. J. Searles claimed that in pursuance of his aforesaid agreement he **thereafter** paid to the said C. J. Searles Co. the aforesaid sum of $507.21 and demanded the same of the defendant, which the defendant for reasons regarded by him as sufficient refused to pay;" (Record, p. 6).

* * * * * * *

d. The plea admits that on November 15, 1893, "the controversy so arising between defendant and C. J. Searles" (plaintiff in the Missouri action) "was **submitted to arbitration, the question as to the illegality of said transaction not being included in the submission,** and an award on the same day rendered against defendant."

* * * * * * *

e. Further on in the plea, it is admitted that **"thereafter,** finding defendant **temporarily** in the State of Missouri, the said Searles instituted suit against him **upon said award** in the Circuit Court of the City of St. Louis," Mo., "to recover the amount thereof" ($507.21).

Then follows this very significant and potent admission

"that upon the *trial* of said case the said court" (referring now to the proceedings in the circuit court in Missouri, wherein the judgment sued upon was rendered) **"refused to allow defendant to show the nature of said transaction, and that under the laws of Mississippi the same was illegal and void,** and held that the award aforesaid was unimpeachable and conclusive" (Record, p. 6).

f. In the concluding passages of the plea, defendant "avers that the essential nature and real foundation of plaintiff's cause of action has not been changed by the award hereinbefore mentioned, nor by the **judgment thereafter rendered thereon** by the Cir-

> cuit Court of the City of St. Louis, State of Missouri, **upon which this action is based,** but it" (we understand, the plaintiff's "cause of action") "is a contract made in violation of the civil and criminal laws of this State," etc. (Record, p. 6).

We mention now, in order that the attention of the court may be held to these salient admissions, that it appears **on the face of the aforesaid plea** that defendant was in Missouri when the action there was instituted; that the action, on which the later judgment in Missouri is founded, was based on the **award** of the arbitrators, and that the "illegality of said transaction" was **not included in the submission,** or (to state the effect of this, as we interpret it) was **waived,** in so far as it might be waived, by the parties interested in the "controversy so arising between defendant" and C. J. Searles (Record, p. 6).

It is also admitted by the plea, in most positive fashion, that defendant, **"upon the trial of said case"** in the Missouri court (having admittedly jurisdiction of the parties, the subject-matter and the cause) submitted to that court the **very issue** discussed with such marked ability by his learned counsel at this bar; that the finding by that Missouri court, on which the judgment sued upon was rendered, was **against the defendant,** and that said ruling passed into a FINAL ADJUDICATION!!

It also appears on the face of the plea, by distinct inference, that C. J. Searles, in pursuance of his previous agreement so to do, made good to C. J. Searles Co. the loss sustained by Mr. Lum **after the loss occurred,** with the assent of defendant, or, at least, his assent is not denied; for the "reasons regarded by him as sufficient" are **not given** for his refusal to pay the loss to plaintiff, who **"claimed"** to have paid same to C. J. Searles Co., after the loss occurred (Record, p. 6).

This "*claim*" is **not denied** in the plea.

The latter events, thus dimly outlined in the plea, are those found and adjudicated to constitute **no defense** in Missouri by the Court of Appeals in a reported opinion on that subject to be discussed more fully later (89 Mo. Ap. 235).

The plea admits that the Missouri judgment was "UPON SAID AWARD" (Record, p. 6) yet the effort of distinguished and learned counsel for defendant in error here, after declaring the rule that "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it," (as formulated in their brief, p. 8) attempts to show that the *cause of action* in the Missouri case was upon some alleged illegal transaction prior to the award, contrary to the admission in the plea and contrary to the laws of Mississippi and of Missouri which alike hold that an award is "an extinguishment of the cause of action" (58 Miss. 298) *merges* all matters within the scope of the submission, and is itself in the nature of a judgment.

Searles *v.* Lum, 81 Mo. Ap. 607.
Jenkins *v.* Meagher, 46 Miss. 94.
Jones *v.* Harris, 58 Miss. 293.

The *award* was the basis of cause of action in the Missouri court and the award was held by the Missouri court to be valid and legal, as the defendant's plea of record in this cause admits.

A DEMURRER to this plea in Mississippi was overruled (Record, p. 8).

A REPLICATION was then filed, asserting that **all the matters** set forth in the plea had been judicially determined against defendant's contention, and asserting that defendant was precluded from again inquiring into the merits of said cause (upon which the judgment herein sued upon was rendered) "by virtue of Article 4, Section 1 of the Constitution of the United States, providing that 'full faith and credit' ", etc. (Record, p. 9).

A SECOND REPLICATION was filed by plaintiff, which raises distinctly, clearly and singly, the federal question argued in

this Court (Record, p. 12) asserting that the judgment is final, etc., referring again to the "full faith and credit" clause of the constitution.

The trial court in Mississippi overruled a demurrer to the second replication; and, upon defendant declining to plead further, a judgment was rendered for plaintiff for $851.08 and costs, November 30, 1901.

The SUPREME COURT OF MISSISSIPPI reversed that judgment, however, for reasons given in the reported opinion, reproduced in the learned brief for defendant in error.

Lum *v.* Fauntleroy, 80 Miss. 763.

Obeying the directions given, the trial court, when the cause was remanded, *sustained* the demurrer to the second replication, gave judgment for defendant, on affirmance of which by the Supreme Court (December 18, 1906) the pending writ of error was duly obtained to reverse the final judgment of the Supreme Court of Mississippi, the usual exceptions and other formal steps having been regularly taken to raise the questions discussed in this Court (Record, pp. 18-23).

ASSIGNMENT OF ERROR.

The plaintiff in error assigns (Record, pp. 22–3) that the Supreme Court of Mississippi and the Circuit Court of Warren County therein, by their judgments herein, have erred in refusing and denying to plaintiff in error his rights under the "full faith and credit" clause of the Constitution of the United States and of the Acts of Congress in pursuance thereof, and in denying to the said judgment of the circuit court of Missouri that "full faith and credit," secured by the constitution and laws of the United States, to the manifest prejudice and injury of the plaintiff in error.

REPLY BRIEF OF THE ARGUMENT.

This defendant certainly has had his *"day in court."* He has had several days, from the year 1893, when the award was rendered against him by the arbitrators, to February 23, 1900, when the Missouri judgment, in suit now, likewise was rendered.

The *"illegality"* (as he claims in the case at bar) which he avers was not submitted to the arbitrators although **"the controversy so arising"** was otherwise submitted, is supposed to survive the award which the arbitrators returned in favor of Mr. Searles for the amount of his claim; it is also supposed to survive the adjudication **on that very issue** which was submitted to, and decided by the Missouri court, the *"full faith and credit"* clause of the Constitution of the United States to the contrary notwithstanding.

The ingenious and artistic plea advanced to reach such a result is by invoking the doctrine of a supposed **want of jurisdiction** in the Mississippi (not the Missouri) courts to enforce the original claim of Mr. Searles against defendant for the funds advanced to the C. J. Searles Co. to repay losses sustained by defendant "in consequence of contracts of the character above described," which might thereafter be negotiated by it **"at the instance of defendant"** (Record, p. 5). The plea is shaped with characteristic ability and force by learned counsel for defendant in a manner which seeks to make the Mississippi law, against *"futures"*, or illegal and sham dealings on the fluctuations of the markets, applicable to uproot the effect of a judgment in another State in an action *not* on the original transactions but upon an *award* which is valid and "within the principle of *res judicata*" (to quote the Mississippi court, 50 Miss. 294) where the Court, having full jurisdiction over the person of defendant, of the subject-matter and of the cause, by regular procedure, has rendered a judgment against defend-

ant, having had the identical present issue of illegality (in the original transaction) duly submitted as part of the case for decision in the action on the award.

If there is something left of vitality in the "full faith and credit" clause of the organic law of the United States, we respectfully submit that the contention of defendant should not prevail.

I.

The defendant's claim of want of jurisdiction in the Mississippi court to give "full faith and credit" to the Missouri judgment is groundless.

There has been no claim made of any want of jurisdiction in the Missouri court, either in respect of the person of defendant, or the subject-matter of the action in Missouri, or otherwise. The defendant's plea relies on the supposed force of the local statute of Mississippi (sec. 2117, Code of 1892, now sec. 2303, Code of 1906) declaring that a contract for purchase or sale of a commodity to be delivered at a future day, the PARTIES not intending an actual delivery and payment of price "SHALL NOT BE ENFORCED BY ANY COURT."

It is ably argued that this affects the JURISDICTION of every court in Mississippi, so that no such court can enforce a judgment of a sister State wherein the court rendering such judgment has EXPRESSLY DECIDED that the contract on which that judgment is based, was NOT SUCH A CONTRACT as the Mississippi statute condemns and has also decided that the cause of action in the Missouri court was upon the *award* (which is untainted by illegality) and not upon any earlier transactions merged in the award, which operates as an "*extinguishment*" of the prior cause of action.

Jones *v.* Harris, 58 Miss. 293.

The logical effect of conceding the contention of defendant in error would be to strike with nullity the powers of the

courts of Missouri to exercise their proper judicial functions.

Our fairly modest contention for plaintiff in error is, on the contrary, that the courts of Missouri, under her laws and procedure regularly observed, have the power to determine whether or not a civil obligation (made in Missouri or elsewhere) is tinctured with any sort of illegality, and that where a valid judgment is rendered in Missouri, upon a cause of action founded on a voluntary and valid award of arbitrators, the same force and effect should be given to that judgment in Mississippi which are accorded thereto in and by the laws of Missouri.

R. S., U. S., sec. 905.

The plea of "want of jurisdiction" is supposed by defendant in error to have efficacy sufficient to get behind not merely the FINAL JUDGMENT of the Missouri court (which adjudicated the VERY QUESTION again mooted here) but to get behind the prior AWARD OF ARBITRATORS, voluntarily chosen by the parties concerned, who were NOT ASKED TO PASS UPON the illegality of the original contract and whose decision is an *"extinguishment"* of the prior matters submitted.

Jones *v.* Harris, 58 Miss. 298.

Thereby defendant forever WAIVED that question of illegality (if it could be waived) and certainly defendant could not justly be allowed to SPLIT UP his defense, or to keep part of it in reserve for future use, if needful, while going blandly before the arbitrators on the issue of indebtedness. If defendant was indebted to plaintiff (as the arbitrators found and adjudged) that fact and finding barred any later plea by defendant that the contract, which lay at the root of the "controversy so arising" (Record, p. 6) was illegal, or was otherwise insufficient, when that "controversy" had been merged in the award and the latter had been the cause of action on which a judgment in another state had been pronounced. The prior question of indebtedness was merged in the award, which partakes of the nature of a judgment.

Searles *v.* Lum, 81 Mo. Ap. 607.

Searles *v.* Lum, 89 Mo. Ap. 235.

The Missouri law in this particular is not different from that prevailing elsewhere.

On this precise point, it is held in Mississippi that "the trial before arbitrators, or an umpire, and their award, is *quasi* judicial." Following the declaration in Art. 3, Code 1857, p. 371 (in substance like sec. 107, Code of 1906) it has been held that "it is not legitimate, therefore, in exceptions to the award, to inquire into the original merits in favor of the one party or the other, or to show that in the evidence the award ought to have been different, or that the law of the case was misconceived or misapplied, or that the decision, in view of all facts and circumstances, was unjust."

Jenkins *v.* Meagher, 46 Miss. 84 (94).

In a later decision by the same court it was ruled that "the award was an extinguishment of the cause of action," embraced in the submission.

Jones *v.* Harris, 58 Miss. 293 (298).

The same court, quoting the language of Chief Justice SHAW in Boston Water Power Co. *v.* Gray, 6 Met. 131, has approved the proposition that the decision of arbitrators, as to matters of fact and law, "acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive"; * * * It is within the principle of *res judicata;* it is the final judgment for that case and between these parties."

Railroad Co. *v.* Scruggs, 50 Miss. 284 (294).

It must be constantly borne in mind that the Missouri action was founded ON THE AWARD, and NOT on the original transaction between these parties.

This appears by EXPRESS ADMISSIONS in the plea of defendant, below (Record, p. 6).

The Missouri court adjudged that the award in Mississippi was valid and ultimately rendered judgment accordingly.

Searles *v.* Lum, 81 Mo. Ap. 607.
Searles *v.* Lum, 89 Mo. Ap. 235.

What proper force or effect can the Mississippi law as to "futures" have to deprive the Missouri court of its power to pass upon the questions of law and fact submitted to it under the laws of Missouri?

There was no want of jurisdiction in the Missouri court; and that issue is surely a federal question in an action on the judgment of a sister State.

Rogers *v.* Alabama, 192 U. S. 231.

No penal law, as in view in the *Pelikan* case (127 U. S. 265) is involved in this litigation. The Missouri court adjudicated the issues of civil liability which the pleadings and evidence disclosed and gave judgment thereon. That judgment is, we respectfully submit, entitled to the same conclusive effect in Mississippi which it had in Missouri. This we consider settled by decisions of this court already cited, as well as by the following:

Huntington *v.* Attrill, 146 U. S. 684.

Jaster *v.* Currie, 198 U. S. 144.

II.

The effect of the Missouri judgment by the law in that State is to merge the original claim in the award and the award in the judgment, precluding any such inquiry as the plea of defendant seeks to open in this cause.

In the pioneer days of Missouri a statute (resembling part of the Mississippi Code of 1892) came under review. It declared that "all judgments * * * given * * * contrary to the provisions of the Act against gaming might be set aside and vacated by any court of equity upon bill filed," etc.

The court in expounding this law decided that the statute could only apply to judgments by confession, and not to litigated, or adversary judgments; and that where a judg-

ment was obtained in due course of law, it could not be vacated in chancery "on allegations of a gaming consideration."

Wilkerson *v.* Whitney, 7 Mo. 295.

In a later decision, an attempt was made to show ORIGINAL ILLEGALITY in a contract, on which a judgment had been rendered. The later case was an action for money paid to the use of defendant by plaintiff (upon such judgment against plaintiff and the intestate of defendant, on a demand whereon plaintiff was merely a surety), it was *held* that defendant was precluded and estopped by the judgment from showing that it was founded on a cause of action (a bond) void on account of an illegal consideration.

Pitts *v.* Fugate, 41 Mo. 405.

In later rulings of strongest significance, in view of Missouri decisions on some phases of LIABILITY ON MUNICIPAL BONDS, the judgment of a federal court having jurisdiction, was *held* valid on some county bonds, although the latter were void under the local laws as construed in Missouri, it being ruled that the cause of action was merged in the judgment and that the latter bore no taint of illegality.

State *ex rel. v.* Rainey, 74 Mo. 229.

State *ex rel. v.* Trammel, 106 Mo. 510.

It has been further held that a judgment cannot be collaterally attacked because the cause of action is founded on an obligation illegal under Missouri law.

Copenhaver *v.* Stewart, 118 Mo. 377 (40 Am. St. 382).

Even an allowance of a note by the probate court has the effect of a judgment so as to merge therein the existing cause of action; hence, an assignee of the judgment of allowance has *better title* than an assignee of the note itself after the allowance.

Julian *v.* Calkins 85 Mo. 202.

The general rule of the Missouri cases is that the old debt is merged in the judgment, so that a foreign administrator,

who has recovered judgment in a foreign jurisdiction, may sue the debtor in Missouri when the debtor is found there, despite the general disability of a foreign legal representative to sue in the courts of that State.

Miller *v.* Hoover, 121 Mo. Ap. 568 (97 S. W. 210).

It is now recognized as an accepted rule, touching the effect of judgments, that matters which might have been shown as defenses are concluded by judgment in Missouri where they were within the scope of the issues made, whether expressly passed upon or not.

Hamilton *v.* McLean, 169 Mo. 51.

It is settled law in Missouri that fraud in the CAUSE OF ACTION is no bar to a judgment which has been recovered thereon.

Field *v.* Sanderson, 34 Mo. 542.

There is no claim of fraud in the procurement of this judgment at bar, or of any other substantial irregularity in the procedure in Missouri. Illegality in the original claim is not as strong a taint or blemish as fraud would be, in the inception of the judgment. Yet this court has held that such fraud could not be used as a defense to an action in one State upon a judgment in another.

Christmas *v.* Russell, 5 Wall. 290.

In this connection it may be interesting to mention that it is pointed out by Judge VANFLEET, in his useful treatise on *Collateral Attack* (upon judgments) that in *Thompson v. Whitman*, 18 Wall. 457, this court declared (p. 467) it had been held in *Christmas v. Russell*, 5 Wall. 290, that "fraud in obtaining a judgment in another state is a good ground of defense to an action on the judgment," whereas in Maxwell *v.* Stewart, 22 Wall. 77, it is said (p. 81) that "in *Christmas v. Russell*, this court held that fraud could not be pleaded to an action in one State upon a judgment in another."

Vanfleet, Collat. Attack (1st ed., 1892) sec. 558, p 586, note 5.

The learned author remarks that the latter ruling contained the correct interpretation of the holding in the *Christmas* case.

The rule prevailing in Missouri is declared by the *Field* case above (34 Mo. 542) and if fraud in the cause of action is not open to examination in Missouri in a suit on a judgment of a sister state, mere alleged "illegality" IN THE SECOND DEGREE would likewise be unavailing for that purpose.

That an award is merged in a judgment has been expressly held in Missouri, in the same decisions which declare that the original claim or controversy is merged in the award.

Searles *v.* Lum, 81 Mo. Ap. 607.
Searles *v.* Lum, 89 Mo. Ap. 235.

And the law of Mississippi is not different.

Railroad *v.* Scruggs, 50 Miss. 294.
Jenkins *v.* Meagher, 46 Miss. 84.
Jones *v.* Harris, 58 Miss. 293.

III.

The Missouri judgment should have "full faith and credit" under the Constitution as a direct adjudication of the very issue of illegality advanced herein.

Your Honors noticed, we trust, that the plea admits distinctly that the jurisdiction of the Missouri court was invoked by defendant "upon the trial of said case," and that the Missouri court thereupon (to quote literally the plea) "REFUSED TO ALLOW DEFENDANT TO SHOW the nature of said transaction, and that under the laws of Mississippi the same was illegal and void" (Record, p. 6).

When defendant thus appealed to the Missouri judicial power, and that power passed upon and adjudicated his

contention, should not *"full faith and credit"* be given to that adjudication everywhere?

If such "faith and credit" be not given on such a state of facts admitted, what value is there in judgments generally anywhere?

Here, the exact issue raised in the case at bar was raised and determined in Missouri, and thereafter the judgment in question was pronounced against defendant.

Is there enough vigor left in the organic and statutory law of the United States to give some "credit" to such a judgment when its enforcement is sought in some other State where the defendant may be afterwards found?

The *"full faith and credit"* clause of the federal constitution originated in a section of the Articles of Confederation.

The debates in the Convention disclose how important the subject was deemed by our forefathers (Documentary Hist. of the Constitution, 1900, pp. 634-6) and how carefully the terms of the present section were weighed and given final expression. The legislation of Congress aimed to enforce the organic command by enacting that such "judicial proceedings" should have "such faith and credit given to them in EVERY COURT within the United States as they have by law or usage in the courts of the States from which they are taken" (R. S., U. S., sec. 905).

The force of these mandates of federal law would amount to nothing if such an express adjudication as here appears in Missouri upon an issue of alleged illegality in an original claim, on which, first an award, and then, upon the award a judgment had been rendered, might be cut down and annihilated by allowing the original claim to be reinvestigated in some state where the final judgment of such adjudication is sought to be enforced.

We do not believe that such "faith and credit" are of the sort which the constitution and laws of the United States intended to impart to judgments of a sister state.

The decisions of other state courts could be cited in great number to indicate that the view entertained by the Supreme

Court of Mississippi, on the subject of our present discussion, does not generally prevail. We cite only a few examples of rulings which seem to us to give effect to the true meaning of the constitutional terms "FULL *faith* and credit."

Vaught *v.* Meador, 99 Va. 569 (39 S. E. 225).
McGilvray *v.* Avery, 30 Vt. 538.
MacDonald *v.* Railroad, 71 N. H. 448 (52 Atl. 982).
Peet *v.* Hatcher, 112 Ala. 514 (57 Am. St. 45):
Indiana *v.* Helmer, 21 Iowa 370.

If the unique and original idea, which appears at the root of the defense here, is to prevail, and the supposed "want of jurisdiction" to enforce a judgment, DISTANT TWO DEGREES from the alleged illegal contract, is available as a bar to any recovery upon the Missouri judgment, we might later see another acute example of some judgment abroad, brought into Mississippi, where the contract recovered upon was within the Mississippi statute of frauds which declares (Code 1906, sec. 4775; Code 1892, sec. 4225) that

> "an action shall NOT BE BROUGHT whereby to charge a defendant or other party (*a*) upon any special promise to answer for the debt or default or miscarriage of another person;" etc.,

followed by four other specifications of contracts, and the declaration, that unless such contract or memorandum or note thereof be in writing, etc.

Contracts within this statute and within any and all statutes, prescribing forms or modes for contracts, would be subject to attack even behind judgments, the inquiry being claimed to be "JURISDICTIONAL," and judgments thereon, beyond the confines of Mississippi, could not be enforced in that State, even although the court abroad had expressly been asked to decide and had decided the very question involved in the Mississippi law! ! !

Such consequences we opine would leave little of "faith and credit" to any judgment of a sister state in Mississippi. It turns, we respectfully submit, too cold a shoulder to the

sister to be tolerated by the august Mother to whose authority any sister of the family of states may appeal where the conduct of one is unsisterly, when measured by the terms of the family compact which they have all accepted for the peaceful adjustment of domestic differences.

A sketch of the origin of the American federal law of this subject, and some comments on the difference between its precepts and those applicable to judgments in other nations, is given in a well-known decision of this court:

> "The law upon this subject, as understood in the United States, at the time of their separation from the mother country, was clearly set forth by Chief Justice PARSONS, speaking for the Supreme Judicial Court of Massachusetts, in 1813, and by Mr. Justice STORY, in his Commentaries on the Constitution of the United States, published in 1833. Both those eminent jurists declared that by the law of England the general rule was that foreign judgments were only *prima facie* evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another Colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England. And they noted that, in order to remove that inconvenience, statutes had been passed in Massachusetts, and in some of the other Colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring Colony could not be impeached. Bissell *v.* Briggs, 9 Mass. 462, 464, 465; Mass. Stat. 1773-4, c. 16, 5 Prov. Laws, 323, 369; Story on the Constitution (1st ed.), §§ 1301, 1302; (4th ed.), §§ 1306, 1307."
>
> Hilton *v.* Guyot, 159 U. S. 181.

The learned opinion also proceeds to comment on the effect of international judgments, and to apply to them a different rule from that governing the "faith and credit" to be ascribed to interstate judgments within the federal Union.

The late federal cases which hold that certain issues of jurisdiction withdraw the judgments of sister states, in some instances from the reach of the "full faith and credit" clause, fall short of application to the facts appearing in this record. Those facts, we submit respectfully, bring the Missouri judgment in the case at bar clearly within the protection of the federal legislation intended to secure the "FULL FAITH AND CREDIT" intended by the spirit and terms of the Constitution.

IV.

Even if the plea of defense by defendant is relevant, it is nevertheless insufficient under federal law.

We insist most respectfully that enough "faith and credit" be given to the judgment in Missouri to keep it standing until facts which impugn its effect appear.

Here the facts alleged in the plea indicate, by clearest inference, at least, that Mr. Searles paid to C. I. Searles Co. losses previously incurred by defendant. It is not averred that this was without assent of defendant; on the contrary, it is said that the transactions were done "at the instance of defendant" (Record, pp. 5-6).

On these facts, the alleged illegality of the original contract would be immaterial, and the defendant would be liable under all law, federal and state, to plaintiff for the funds so advanced, even if they had been lost in actual gambling.

Here the cause of action in Missouri was the *award* in Mississippi, and there is nothing in the law of either state to forbid the exercise of general jurisdiction of their courts

to entertain an action and to render judgment upon an award. And if either state should refuse to accord "full faith and credit" to the judgment of the other, the federal court of highest authority would be warranted in applying the necessary corrective, under the federal law.

The rule on this subject, recognized in this jurisdiction, is expressed distinctly in a carefully considered opinion as follows:

> "If the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in *Wisconsin v. Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.
>
> "If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense." * * *
>
> "So if the State court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if THE STATE COURT DECLINES TO GIVE FULL FAITH AND CREDIT TO A JUDGMENT OF ANOTHER STATE, because of its opinion as to the *nature of the cause of action* on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, *must decide for itself* the nature of the original liability."
>
> Huntington *v.* Attrill, 146 U. S. 683, 684.

(The display type is ours, of course.)

> "In the absence of a restrictive statute, money loaned to pay either gambling debts or those created by prohibited business transactions, may be recovered when the loan was not a mere device or makeshift to cover the lender's participation in the affair. This is particularly true when the money is advanced after the affair is over and not for the purpose of enabling the borrower to engage in it."
>
> Searles *v.* Lum, 89 Mo. Ap. 239-40.

The court cites a number of decisions supporting that ruling, to which we add

Bank *v.* Edman, 99 Ill. App. 235.

Read *v.* Anderson, 10 Q. B. D. 100.

Wyman *v.* Fiske, 3 Allen 238.

Brooks *v.* Brady, 53 Ill. App. 155.

Ex parte Pyke, 8 Ch. Div. 754 (misprinted in opinion).

b. The plea also alleges that defendant "DOES NOT KNOW who was the alleged vendor in the contracts" which he alleges are illegal. This nullifies the prior allegation that "THE APPARENT SELLER" did not intend that the cotton should be "actually delivered in kind."

The positive law of Missouri, no less than the law of Mississippi, puts the stamp of illegality upon "futures," as defined by the Mississippi Code (1906, sec. 2303; Code of 1892, sec. 2117).

State *v.* Gritzner, 134 Mo. 512.

The transactions called "futures," intended to be condemned and invalidated by the law of Mississippi, are—

> "void only when the real intent of the parties is to speculate in the rise and fall of prices and the goods are not to be delivered."
>
> Clay *v.* Allen, 63 Miss. 426.

Recently this ruling was repeated and approved:

Campbell *v.* Bank, 74 Miss. 526-529.

To the same purport is also Tel. Co. *v.* Littlejohn, 72 Miss. 1025.

The civil and criminal law of Missouri is in accord with the rulings just cited.

Crawford *v.* Spencer, 92 Mo. 498.

State *v.* Gritzner, 134 Mo. 512.

Where does the plea make proper averments to bring the case within the law of either state, when defendant admits (Record, p. 5) he "DOES NOT KNOW who" was the "apparent seller" in the "deals." Without averments bringing the defense within the Mississippi rule (as above indicated) there would be no ground to deny to the Missouri judgment the "full faith and credit" to which it is at least entitled until something material is disclosed to impeach it, under recognized precepts of federal law.

It was the duty of defendant, in alleging such a defense, to make his allegations clear and unequivocal, for the presumption of law is IN FAVOR OF THE LEGALITY of a contract, and if it is susceptible of two constructions, one legal and the other illegal, the one favorable to its legality will be adopted.

Wilkins *v.* Riley, 47 Miss. 306.

The WANT OF KNOWLEDGE of defendant is not consistent with the preceding general allegations of illegal intent; and on the contradictory averments, there can be, we submit with all due respect, no substantial force in the defense of illegality, or in the claim of any want of power or jurisdiction in the Mississippi court to enforce the judgment obtained in Missouri.

Moreover, even if the plea of defendant be given its fullest claimed scope and purport, it would still fail to show facts sufficient to invalidate the Missouri judgment or to rob it of the "full faith and credit" which the federal law accords to it. The ruling of a state court on a state statute is always "subject to the inquiry whether the statute as construed IS CONSISTENT WITH THE CONSTITUTION of the United States."

Anglo-Am. Co. *v.* Davis Co., 191 U. S. 374.

We respectfully contend that in no aspect of the case does the plea of defendant exhibit any defense to the Missouri judgment.

A solution of the question whether "full faith and credit" have been given to the judicial proceedings of another state, must depend "upon the particular facts of each case and the manner in which they are presented."

Finney *v.* Guy, 189 U. S. 335 (340).

In the case at bar, we claim that the contention of any "want of jurisdiction" in any of the courts below is devoid of merit.

Status of the Assignee of the Judgment.

The plaintiff in error is assignee of the judgment rendered in Missouri. He brought the suit in Mississippi. It does not appear that he is a citizen of Mississippi or ever was such citizen, or ever was in way subject to her laws before he began this suit in Warren county of that State. If there is any difference between his status and that of the first plaintiff, Mr. Searles, it is a difference favorable to the assignee.

But the rule of "full faith and credit" applies as well in favor of privies as of parties to the judgment.

Stacy *v.* Thrasher, 6 How. 58.

McLean *v.* Meek, 18 How. 18.

This is, of course, a general doctrine of jurisprudence. In Missouri, in defining the *status* of an assignee of a judgment, it has been *held* that the assignment carries to the assignee not merely title to the judgment but all the remedies and security incident thereto.

State *ex rel. v.* Hoshaw, 98 Mo. 358.

Burns *v.* Bangert, 16 Mo. Ap. 22.

And after assignment, no act of the assignor can defeat the rights of the assignee conferred by the assignment.

Laughlin *v.* Fairbanks, 8 Mo. 367.

We consider the position of plaintiff in error to be fully

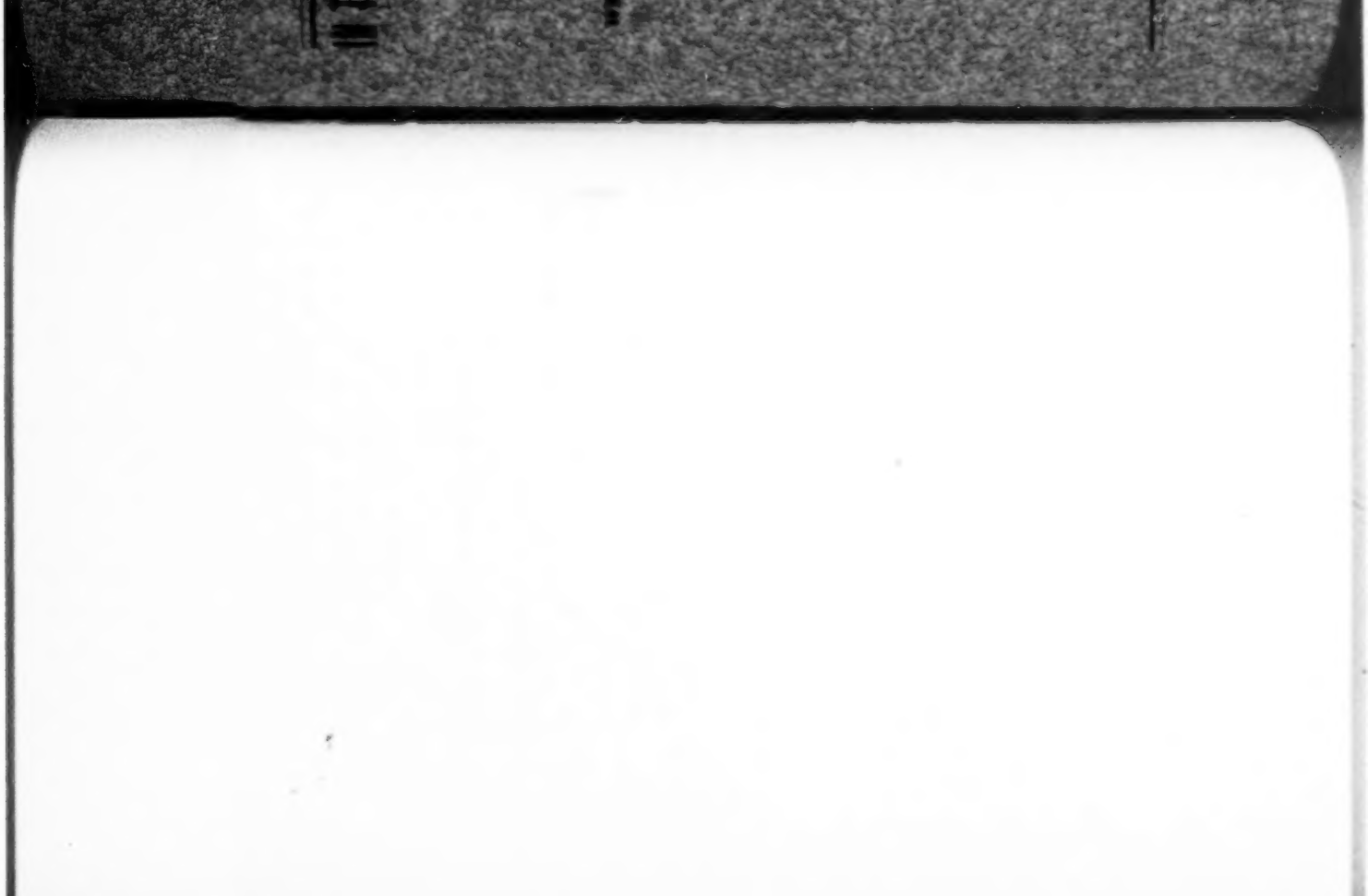
within the protection of the federal law in regard to the force and effect of the Missouri judgment.

Without prolonging the discussion unnecessarily, we insist most earnestly that the Supreme Court of Mississippi has not given "full faith and credit" to the Missouri judgment, within the spirit and intent of the federal law, and we ask accordingly that the judgment be reversed, with such appropriate directions as may be just.

Shepard Barclay

Of Counsel for Plaintiff in Error

APRIL, 1908



NOV 23 1907

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1907.

NO. 315

WRIT OF ERROR TO SUPREME COURT OF MISSISSIPPI.

T. J. FAUNTLEROY, Plaintiff in Error,

vs.

J. J. LUM.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT L. McLAURIN,
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E. L. DAVIS,
Vicksburg, Miss.
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MARSHALL GREEN,
Jackson, Miss.
Attorneys for Plaintiff in Error.

Tucker Printing House, Jackson, Miss.

In the Supreme Court of the United States.

T. J. FAUNTLEROY, Plaintiff in Error,

vs.

J. J. LUM.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes from the Supreme Court of the State of Mississippi, and it presents a federal question under the clause of the Constitution and the Federal Statutes enacted in pursuance thereof guaranteeing full faith and credit to the judgments of the several states.

The facts are that Searles & Co., at Vicksburg, Mississippi, were engaged in buying and selling future contracts, and defendant in error, Lum, became indebted to them therefor, and a controversy having arisen it was submitted to aribtration and an award was made in Searles' favor. Suit was brought upon this award in the courts of the State of Missouri, and personal service was had upon Lum, and, after a protracted litigation there, the judgment was rendered in favor of Searles, who assigned it to plaintiff in error, Fauntleroy, and he instituted a suit upon the judgment in the Circuit Court of Warren County, State of Mississippi.

Lum pleaded that C. J. Searles & Co. were engaged in making future contracts; that C. J. Searles agreed that he would discharge any obligation to the said C. J. Searles & Co., that the defendant might come under, and that thereafter said Searles & Co. negotiated a sale for 200 bales of cotton; that neither he nor the apparent seller thereof intended that there should be any delivery; that there was a decline, whereupon Searles & Co. closed out the contract and demanded the payment of the sum of $507.21; that C. J. Searles was interested as part owner in the business of Searles & Co. Defendant refused to pay this sum, and thereafter on November 27, 1893, the controversy was submitted by oral agreement to arbitration, the question as to the illegality not being submitted, and an award was made on the same day against defendant;that finding defendant temporarily in the State of Missouri Searles instituted suit in the Circuit Court of the City of St. Louis, Missouri, upon the award to recover the

amount, and upon the trial of the cause the Missouri Court refused to allow defendant to show the nature of the transaction, and that under the laws of the State of Mississippi the transaction was illegal, and caused to be submitted to the jury summoned therein an instruction as follows: "If the jury believe from the evidence that matters in controversy between plaintiff and defendant prior to November 15th, 1893, were on that date submitted to arbitration, and that the arbitrators rendered the award of date November 15, 1893, which has been read in evidence, and if you further believe from the evidence that no part of the sum rendered in favor of the plaintiff in said award has been paid to plaintiff, you should find a verdict for the plaintiff for the sum of $507.21 with interest at the rate of six per cent per annum," and that thereupon, in pursuance of this instruction, a verdict was rendered in favor of the plaintiff whereon the judgment sued on was rendered.

To this plea a demurrer was filed because it denied full faith and credit, and was an attempt to discredit the Missouri judgment. This demurrer was overruled, and leave was given to the plaintiff in error to file a replication, which was done, and wherein was set up that the matters in controversy were all fully adjudicated by the said Court of Missouri, and that judgment was rendered thereon by the Missouri Court, and that the said judgment was entitled to the protection of the Federal Constitution and the Statutes passed in pursuance thereof. To this replication defendant in error demurred, but the Judge having been changed in the interim, this demurrer was overruled, and the defendant in error declined to plead further, and judgment final was rendered in the Circuit Court for the plaintiff in error. Thereupon, the cause was appealed to the Supreme Court of Mississippi, where this judgment was reversed, and the cause was remanded. Upon the new trial in the Circuit Court, a judgment was rendered in accordance with the opinion of the Supreme Court in favor of the defendant, and upon appeal to the Supreme Court of Mississippi, this judgment was affirmed, without any opinion, and from this judgment the case is brought here by writ of error.

POINTS.

(1) By allowing a plea to be interposed in the Mississippi Courts in an action upon a Missouri judgment which was not allowable in the courts of Missouri, both (a) the Federal Constitution, Art. IV, Sec. 1, and (b) Sec. 905, U. S. Rev. Statutes,

were violated, in that full faith and credit to it were denied, and the faith and credit to which it was entitled in Missouri were not given to it in Mississippi.

ARGUMENT.

I.

Effect of Full Faith and Credit Clause and the Statutes Passed in Pursuance of it.

Section 1, Article IV, of the Constitution provides:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, **and the effect thereof.**"

Congress passed an act in 1790, substantially reproduced in Section 905, Revised Statutes:

> "The records and judicial proceedings of the Courts of any state or territory, or of any such country, shall be proved or admitted in any other Court within the United States by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have **such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from which they are taken.**"

These provisions have been often construed.

In **Hampton v. McConnell,** 3 Wheat (1888), 235, Mr. Chief Justice Marshall said: "This is precisely the same case of Mills v. Duryee. The Court cannot distinguish the two cases. The doctrine there held was that the judgment of a state court shall have the **same credit, validity and effect,** in every other court of the United States, which it had in the State where it was pronounced, and whatever pleas would be good to a suit thereon **in such state and none others,** could be pleaded in any other court of the United States."

In that case there was a suit upon the judgment of a state court in another state, a plea of **nil debet,** a demurrer thereto

sustained, and upon appeal it was held that the proper plea and the only proper plea was **nul tiel record.**

In **Mills v. Duryee,** 7 Cr. (1813), 433, Mr. Justice Story passed upon the point thus: "By the Act of 26th May, 1790, Ch. 11, Congress provided for the mode of authenticating the records and judicial proceedings of the State Court, and then further declared that 'the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the Courts of the State from whence the said records are or shall be taken."

The Court finding that the judgment was conclusive in the state where rendered declared that it "was conclusive here also."

In **McElroy v. Wagner,** 13 Pet. (1839), 324, Mr. Justice Wayne said:

> "It must be obvious, when the Constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provided that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it sought to carry them into judgments by suits in tribunals of another state. The authenticity of a judgment and its effect depend upon the law made in pursuance of the Constitution; the faith and the credit due to it as the judicial proceeding of a State, is given by the Constitution, independently of all legislation.
>
> "Now, though this does not declare what was to be the effect of a judgment obtained in one state in another state, what was meant by the clause may be considered as conclusively determined almost by contemporaneous exposition. For when the present Constitution was framed, we find the same clause introduced into it with but a slight variation, making it more comprehensive; and adding 'Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof,' thus providing in the Constitution for the deficiency which experience has shown to be in the provision of the confederation, as Congress under it could not legislate

upon what should be the effect of a judgment obtained in one state to other states. Whatever difference of opinion there may have been as to the interpretation of this article of the Constitution in another respect, there has been none as to the power of Congress under it to declare what shall be the effect of a judgment of a State Court in another State of the Union. Here again we have contemporaneous legislative interpretation of the first section of the Fourth Article of the Constitution; for by the Act of 1790, May 26th, it was declared, 'That the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken.' What faith and credit, then, is given in the states to the judgments of their own courts? They are record evidence of debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, conclusive upon the defendant in every state, **except for such causes as would be sufficient to set aside the judgment in the Courts of the state in which it is rendered.** In other words, as has been said by a commentator upon the Constitution: **'If the judgment is conclusive in the State where pronounced, it is equally conclusive everywhere in the States of the Union. If re-examinable there it is open to the same inquiries in every other state.** Story's Com. 18."

In **Christmas v. Russell,** 5 Wall, (1866), 301, Mr. Justice Clifford, delivering the unanimous opinion of the Court held:

"Article IV, Section 1, of the Constitution, provides, that 'faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof.' Congress has exercised that power, and in effect provided that the judicial records in one state shall be proved in the tribunals of another, by the attestation of the clerk, under the seal of the Court, with the certificate of the Judge that the attestation is in due form. (2) That such records so 'authenticated 'shall have such faith and credit given to them in every other court in the United States as they have by law or usage in the Courts of the state from whence the said

records were or shall be taken.' 1 Stat. at Large, 122; **D'Arcy v. Ketchum, et al.,** 11 Howard, 175.

"When the question or the construction of that Act o Congress was first presented to this court it was argued that the act provided only for the admission of such records as evidence; that it did not declare their effect; but the Court **refused to adopt the proposition, and held, as the act expressly declares that the record when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State Court from whence it was taken. Mills v. Duryee,** 7 Cranch, 483.

"Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the Court has jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defence. **Hampton v. McConnel,** 3 Wheaton, 332; **Nations, et al, v. Johnson, et al.,** 24 Howard, 203; **D'Arcy v. Ketchum,** 11 Id., 165; **Webster v. Reid,** Id., 460; **Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits. Bissell v. Briggs,** 9 Massachusetts, 462; **United States Bank v. Merchants' Bank,** 7 Gill, 430. Speaking of the before mentioned Act of Congress, Judge Story says it has been settled upon solemn argument, that that enactment does declare the effect of the records as evidence when duly authenticated. . . . 'If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere' in the courts of the United States. 2 **Story on Constitution,** (3d ed.), Par. 1313.

"Applying these rules to the present case, it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest Court in the state, and it was undoubtedly correct; and if so, **it is not competent for any other State to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and**

credit that by law it had in the State Courts from which it was taken

"Congress, say the Courts, has declared the effect of the record by declaring what faith and credit shall be given to it. Adopting the language of the court in that case, we say that the defendant had full notice of the suit, and it is beyond all doubt that the judgment of the court was conclusive upon the parties in that state. 'It must, therefore, be conclusive here also.' Unless the merits are open to exception and trial between the parties, it is difficult to see how the plea of fraud can be admitted as an answer to the action."

In **Harding v. Harding,** 198 U. S. (1905), 317, it was determined that a judgment in Illinois rendered by consent has the same force as one rendered in invitum and is entitled to similar faith and credit in the courts of another state. See, also, **Harris v. Balk,** 198 U. S. (1905), 215.

In **Haddock v. Haddock,** 201 U. S. (1906), 567, it is declared that these provisions abrogate the comity rule, and in the majority opinion, and upon this point the court is unanimous, and say:

"The requirement of the Constitution is not that some, but that full faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the State where rendered." **Harding v. Harding,** 198 U. S., 317.

In the dissenting opinion of Mr. Justice Brown, concurred in by three other members of the Court, it was declared:

"The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. 'If a judgment is conclusive in the State where it is rendered, it is equally conclusive everywhere in the Courts of the United States."

And it was declared by Mr. Justice Holmes, concurred in by Justices Harland, Brewer and Brown:

"State courts do not always have the Constitution of the United States vividly present to their minds. But there is no exception in the Constitution. 'If the judgment is conclusive in the state where it was pronounced it is equally

conclusive everywhere." **Christmas v. Russell,** 5 Wall, 290, 302; Marshall, C. J., in **Hampton v. McConnel,** 3 Wheat, 234; **Mills v. Duryee,** 7 Cranch, 481, 485; **Story,** Const., p. 1313. See also **Hancock Natl. Bank v. Farnum,** 176 U. S., 640, 644.

In the Court below opposite counsel laid much stress upon **Wisconsin v. Pelican Insurance Co.,** 127 U. S., 265, but this argument was before the decision of the case of **Haddock v. Haddock,** which upon this point was unanimous (the point of division being not as to the effect of a judgment entitled to the constitutional protection but whether that particular judgment was in that class) (p. 618), and wherein Mr. Justice Holmes said:

> "But there is no exception in the words of the Constitution. 'If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere, * * * find no qualification of the rule in **Wisconsin v. Pelican Insurance Co.,** 127 U. S., 265. That merely decided, with regard to a case not within the words of the Constitution, that a state judgment could not be sued upon when the facts which it established were not a cause of action outside of the State. It did not decide or even remotely suggest that the judgment would not be conclusive as to the facts if in any way those facts came in question."

The entire decision of that case is accurately summed up in its syllabus and is not in any aspect, in conflict with the prior decisions upon that point, which were cited and approved in the Haddock case as wholly unimpaired.

Great stress was laid upon **Provision Co. v. Davis,** 191 U. S., (1903), 374, but we submit that its citation is wholly irrelevant. That case, as there stated, was one of a foreign corporation which could be excluded at will by any state; but principally the holding was that the courts of New York had no jurisdiction because under the express provisions of its statutory laws there was no place to try the cause or to give it effect; as aptly said: "The Court (of New York) also decided that the language quoted goes to the jurisdiction of the Court. x x x The Constitution does not require the State of New York to give jurisdiction against its will. If the plaintiff can find a Court into which it has a right to come, then the effect of the judgment is effected by the Constitution and the act in pursuance of it which the

Congress was passed. Rev. States., Section 905." This objection is wholly outside of the present case for the Supreme Court of Mississippi held that the Circuit Court of Warren County had jurisdiction, and that it was the proper Court in which to institute the action. Indeed, no one ever questioned the proposition that the Circuit Court of Warren County had jurisdiction, for the Constitution of Mississippi upon this subject is peculiar in its verbiage, viz.:

> "SEC. 156.—The Circuit Court shall have original jurisdiction in all matters, civil and criminal, in this State not vested by this Constitution in some other Court, and such appellate jurisdiction as shall be prescribed by law." And it was determined in Madison Cnunty v. Alexander, Walker 523, and in Insurance Co. v. Cramer, 47 Miss., 200, that the Circuit Court has * * * jurisdiction where there is no other legal remedy. Hence, no argument can be based upon the Davis Provision Company case, **supra,** because, the Court **a quo** had jurisdiction to determine the cause.

II.

The Law in Missouri.

The effect of this judgment in Missouri differs from that under the law in Mississippi, for while under the Missouri decisions in determining the effect of this transaction the Mississippi statutes would be looked to and would control, **Lum v. Searles, supra, Gaylord v. Duryee,** 95 Mo. Appeals, (1902), 579, the effect of the Missouri judgment when rendered may be appealed from, and reversed, and what its effect is when suit is brought thereon in Missouri, and what pleas are sufficient answer thereto, are to be determined by the statutes and decisions of that state. The effect of such judgments was established in Missouri in 1842 by **Wilkerson v. Whitney,** 7 Mo., 296, wherein it was declared:

> "The judgments spoken of in the Act of 1825, I understand to be judgments by confession or warrant of attorney. The words, 'given, granted, executed, entered into,' could hardly be applicable upon plea or default. And though the Act of 1835 has omitted these words, and speaks generally of judgments, bonds, notes, and other assurances, yet it is plain that no other judgments were embraced in its provisions,

than judgments by confession. The act was intended to include all **assurances** from the lowest order of specialties to those of the highest dignity in the eye of the law. To suppose that a judgment obtained by due process of law, where no defense was made, or an unavailing one, could be set aside on motion, or re-examined by the Chancellor on allegations of a gaming consideration, would create an anomaly in the law and conflict with the express provisions of our statute declaring that courts of equity shall not have jurisdiction, where adequate relief can be had at law."

This salutary decision has crystalized into a statute in force at the time of the rendition of this judgment in Missouri, and which was integrated therein (Rev. Stat. Mo. ,1889, 1262, Sec. 52) whereby it is enacted that only judgments by confession shall be void when based on a gambling transaction, and that when rendered by default, or upon issue joined and fought as bitterly as was the instant case, there can be no second trial of that which was interposed in the first trial and decided adversely. Under the Missouri statutes and decisions this judgment is conclusive there, Rev. Stat. Mo., **supra; Wilkerson v. Whitney, supra.**

III.

The Effect of the Missouri Judgment in the Mississippi Courts.

Under the Federal Constitution and Section 905 of the Revised Statutes as uniformly interpreted, the same effect as was shown, **supra,** to exist in Missouri under the laws and decisions thereof, the domicile of the rendition of the judgment, must, under the supreme law of the land, be given to it in Mississippi.

In Missouri the merits of the controversy, the nature of the consideration are forever concluded by the judgment herein there rendered. Under the rule in this Court announced by Mr. Chief Justice Marshall, reiterated by Mr. Justice Story, and since integrated as a fundamental principle into constitutional law, the test of the effect vouchsafed to this judgment in Mississippi is its effect under the laws of Missouri. There is no qualification or exception. Upon the trial in Missouri the very fullest opportunity was given defendant in error to make all defenses, and it went twice to the Appellate Court, and was twice decided for plaintiff in error.

Much stress is laid upon the proposition if this judgment is enforced that Mississippi's police power could be set at naught by any state in the Union, and it is urged, upon the ground of public policy, that the express mandate of the Constitution and of Section 905 of the Rev. Stat. should be disregarded. But the contention is superficial. The statute of Mississippi relied upon was in force at the date of the rendition of the Missouri judgment. The meaning, force and effect of the Mississippi statute as to futures was directly involved.

Suppose, as is alleged in the plea, the Missouri Court failed to give full faith and credit to the public acts of Mississippi applicable, the result would be that the Missouri Court rendered an erroneous judgment, in a cause of which it had full jurisdiction by proper personal service of process upon a defense interposed by defendant in error. Under the uniform rulings in Missouri the judgment was there valid, if erroneous, and was a perfect legal obligation in itself until reversed in due course by the Court, for the only error assignable therein. Hence the judgment sued on was, at best, but an erroneous decision of a Missouri Court upon a point necessarily adjudged in determining the issue. Upon proper proceedings a writ of error might have been sued out to this Court, but defendant in error chose to allow the Missouri judgment to become final. Defendant in error failed to pursue the remedy for the correction of an error in a judgment wherein a constitutional right was denied, and has allowed time to elapse and the judgment to become final, and thereby entitled to the full faith and credit guaranteed by the Constitution and Federal Statutes. The day in Court in Missouri of defendant in error has passed, and the effect of the judgment in Missouri became established under its law, and it is now too late to attempt to deny to a valid personal judgment the effect which it would have in the State of Missouri when sued upon there. Being conclusive there it is conclusive everywhere.

A case stronger for the appellant than the one here presented is that of **Draper v. Gorman,** 8 Leigh (1837), 628, where there was a judgment of the District of Columbia sued upon in the Superior Court of Wythe County, Virginia, and a plea was interposed alleging that the judgment of the Circuit Court was recovered on a bill of exchange drawn by their testator, while in a state of

intoxication, for money won at gaming, and this plea was held bad by seriatim opinions of the Court.

Mr. Justice Parker, p. 636, said: "But I do not think that the defendant has the right to go behind the judgment, to re-try its merits and set up a defense which has been or might have been relied on in the original case, or which has been waived, as in this case; and therefore I am of the opinion that the second plea was properly rejected."

Mr. Justice Brockenbrough said: "When Draper was sued in the Circuit Court of the District of Columbia on this bill of exchange, he had the opportunity of pleading that it was for money won at unlawful gaming, or for money won from him unfairly whilst he was in a state of intoxication; or any other good plea in bar. Not having availed himself of that opportunity before a Court having jurisdiction of the cause, I see no reason why that privilege should be extended to him a second time. The special plea was therefore properly rejected."

Mr. President Tucker said: "I conclude therefore that the defendant cannot bring in question the merits of the original judgment; and that the second plea here is naught."

Wherefore, we respectfully submit that the judgment of the Supreme Court of Mississippi is erroneous, and that it should be reversed, and the demurrer to the plea should be sustained, and the demurrer to the replication should be overruled, and the cause remanded.

Respectfully submitted,

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